United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,339—October Term, 1949

JUDITH COPLON,

Appellant,

194

—v.—

UNITED STATES OF AMERICA,

194

Appellee.

BRIEF OF APPELLANT

United States Court of Appeals for the District of Columbia Circuit

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POINT I

With respect to Point IA appellant desires the Court to read the following pages of the reporter's transcript: pages 12-21, 51-64.

With respect to Point IB appellant desires the Court to read the following pages of the reporter's transcript: pages 139-142, 144-147, 216, 219, 223, 224, 226-228, 234, 235, 241, 243, 245-247, 249-251, 253, 257.

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With respect to Point IIA appellant desires the Court to read the following pages of the reporter's transcript: pages 15, 16, 33, 62-66, 180, 185, 186, 499, 554, 588, 589, 733, 776, 777, 782, 783, 800, 869, 872, 877, 888, 926, 928, 931, 1118, 1119, 1127, 1129, 1140, 1141, 1144, 1160, 1189, 1190, 1195, 1196, 1307, 1320, 1322, 1325-1327, 1364, 1416, 1417, 1420, 1421, 1937, 2064, 2065, 2166, 2167, 2306, 2347, 2358, 2359, 2378, 2382, 2384, 2423, 2446, 2557, 2587, 2672, 2793, 2862, 2935, 3260, 3334-3336, 3383, 3385, 3459, 3532, 3680, 3739, 3867, 3870, 3871, 3899, 3900, 4003, 4005, 4088, 4089, 4109, 4311, 4572.

With respect to Point IIB appellant desires the Court to read the following pages of the reporter's transcript: pages 280, 960-964, 3890, 3973, 3988, 3989, 4107, 4112, 4587, 4617, 5071, 5158, 6495, 6506, 6797, 6823, 8022.

POINT III

With respect to Point IIIA appellant desires the Court to read the following pages of the reporter's transcript: pages 6471-6479.

With respect to Point IIIB appellant desires the Court to read the following page of the reporter's transcript: page 5008.

With respect to Point IIID appellant desires the Court to read the following pages of the reporter's transcript: pages 247-249, 258, 259, 409, 411, 412.

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With respect to Point IV appellant desires the Court to read the following pages of the reporter's transcript: pages 251, 261, 262, 264-267, 276, 277, 280, 291, 294, 307, 310, 341, 371, 372, 387, 388, 390, 391, 397, 403, 409, 423, 781, 874, 875, 961, 963, 964, 965, 1029, 1030, 1032, 1057, 1058, 1155, 1210, 1213, 1214, 1216, 1246, 2095, 2178, 2382, 2575, 2581, 2822, 2955, 2956, 3319, 3686, 3691, 3899-3902, 3941, 3946, 3947, 3973, 3974, 3988-3990, 4004, 4005, 4088, 4089, 4107, 4109, 4112, 4119, 4120, 4161, 4310, 4311, 4314, 4327, 4427, 4617, 4618, 4857, 5156, 5158, 6389, 6495, 6496, 6497, 6501, 6503, 6506, 6734, 6735, 6742, 6743, 6747, 6823, 6824, 6910, 6912, 6913, 6915, 6917, 6919, 6920, 6921, 6923, 6926-6939, 6941, 6942, 6945, 6947, 6948, 6965-6970, 6973-6975, 6982, 7032-7035, 7038-7040, 7043-7048, 7111, 7112, 7118, 7119, 7128-7131, 7137, 7140-7142, 7146-7149, 7150-7154, 7164, 7179, 7180, 7194-7199, 7204, 7207, 7227-7229, 7230, 7281, 7290, 7291, 7296, 7297, 7309, 7310-7313, 7326-7328, 7330, 7331, 7339, 7346, 7350-7352, 7372, 7388-7389, 7390-7395, 7397, 7402, 7403, 7408, 7409, 7418, 7426, 7566, 7634-7639, 7673, 7674, 7715, 7722, 7723, 7834-7837, 7902, 7905, 7907, 7913, 7915, 7918, 7922, 7927, 7929, 7930, 7984, 7989, 7990, 8016, 8055, 8384, 8465-8471.

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With Respect to Point VA appellant desires the Court to read the following pages of the reporter's transcript: pages 8318, 8319, 8320, 8362, 8363, 8368, 8377, 8383.

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With respect to Point VD appellant desires the Court to read the following pages of the reporter's transcript: pages 8368, 8372, 8374, 8376, 8384.

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With respect to Point VF appellant desires the Court to read the following pages of the reporter's transcript: pages 8368, 8369.

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With respect to Point VH appellant desires the Court to read the following pages of the reporter's transcript: pages 8321, 8322.

With respect to Point VI appellant desires the Court to read the following pages of the reporter's transcript: pages 8327, 8328.

With respect to Point VJ appellant desires the Court to read the following page of the reporter's transcript: page 8328.

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With respect to Point VIC appellant desires the Court to read the following pages of the reporter's transcript: pages 649, 3686.

With respect to Point VID appellant desires the Court to read the following pages of the reporter's transcript: pages 5242, 5456, 5458, 8389, 8391, 8393, 8394.

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With respect to Point VIIA appellant desires the Court to read the following page of the reporter's transcript: page 8274.

With respect to Point VIIB appellant desires the Court to read the following page of the reporter's transcript: page 8275.

With respect to Point VIIC appellant desires the Court to read the following pages of the reporter's transcript: pages 8275, 8276.

With respect to Point VIID appellant desires the Court to read the following pages of the reporter's transcript: pages 8276, 8277.

With respect to Point VIIE appellant desires the Court to read the following page of the reporter's transcript: page 8292.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,339—October Term, 1949

JUDITH COPLON,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Judith Coplon, the appellant herein, was indicted on the 16th day of March, 1949, in the United States District Court for the District of Columbia. The indictment contained two counts. Count I charged that the appellant, during the period from on or about December 10th, 1948 to March 4th, 1949, at Washington, District of Columbia, for the purpose of obtaining information respecting the national defense, and with intent and reason to believe that the information was to be used to the injury of the United States and to the advantage of a foreign nation, did copy, take, make and obtain documents, writings and notes connected with the national defense, to wit, documents, writings and notes which were part of the official files and records of the Department of Justice containing intelligence reports relating to espionage and counterespionage activities in the United States, in violation of Title 18, U. S. C., Section 793. Count II charged that the appellant, during the same period, and at the same place, being an employee of the Department of Justice and in such capacity having custody of records, documents and papers filed and deposited with the Depart-

ment of Justice, did wilfully and unlawfully conceal and remove certain of such records and documents, to wit, certain extracts and summaries of reports of the Federal Bureau of Investigation, known as data slips, containing intelligence reports relating to espionage and counter-espionage activities in the United States, in violation of Title 18, U. S. C., Section 2071. Following a trial by jury the appellant was convicted on both counts of the indictment and sentenced to imprisonment for not less than forty months nor more than TEN years on the first count and from one to three years on the second count, both sentences to run concurrently.

This is an appeal from the judgment of conviction dated July 1st, 1949.

Statement

Education and Background

The appellant, Judith Coplon, is twenty-eight years old, single, a natural born citizen of the United States and a resident of Brooklyn, New York City, where she has lived with her parents at all times except during her employment in Washington, D. C., with the Department of Justice, from February, 1945 to March 4, 1949 (s. m. 6923, 6913). Her father, who died on March 29, 1949, was a veteran of the Spanish-American war, born in Troy, New York, a natural born American citizen (s. m. 6915); her mother, also a native American, was born in Albany, New York (s. m. 6913) and lives with appellant in an apartment in Brooklyn, New York.

Appellant attended James Madison High School in Brooklyn, New York, from which she was graduated in 1939. She then attended Barnard College (Columbia University), New York City, on a scholarship, where she majored in history

and from which she was graduated *cum laude* in 1943 (s. m. 6913). While attending high school she wrote for the school literary magazine (s. m. 7180). This interest in writing continued at college, where she served as a reporter for the college newspaper and, during her senior year, was selected as managing editor of the newspaper (s. m. 6913).

Upon graduation from college in June, 1943, she was employed in New York City by the Economic Warfare Section of the United States Department of Justice. Her position, to which she had been recommended by her college (s. m. 6921) involved preparation of reports on the international ramifications of German cartels (*ibid.*). She continued in this employment until January, 1945, when she was transferred to the Foreign Agents Registration Section in the Department of Justice at Washington, D. C., as a political analyst where she remained until her arrest on March 4, 1949 (s. m. 6923).

From 1948 until her arrest, appellant made various attempts, which she openly discussed with her supervisor, Mr. Foley, and with her office associates, to change her position for one offering greater security or less routine work (s. m. 403), and preferably located in New York City, where her parents resided (s. m. 7034). Her attempts to obtain government employment in New York City were unsuccessful due to her temporary status in the Civil Service as a war-service employee (s. m. 7034, 7035, 7408, 7409). Her efforts to obtain employment at the United Nations in New York City were also unsuccessful due to her lack of facility in foreign languages (s. m. 7047, 7048, 7034, 7035). Following these unsuccessful efforts appellant considered leaving government service and pursuing a writing career (s. m. 7326, 7327) for which she believed herself somewhat qualified, and made inquiries for admission to the School of Journalism at Columbia University, New York City, for the coming semester, February 1949 (s. m. 7038, 7290-7291).

Appellant's interest in writing professionally had progressed through the latter part of 1948 and early 1949 to the extent that she commenced writing an autobiographical novel of a "Government Girl" employed in Washington in which she attempted to depict the political climate of Washington as it existed during the war years and as it subsequently changed during the post-war period of personnel turnover, the loyalty program and the activities of the Un-American Affairs Committee (s. m. 7339).

Appellant, accordingly, communicated with Barnard College by mail, informing them of her plans to continue journalism and inquired as to the possibility of obtaining part-time work in New York while attending school (s. m. 7038, 7290-7291). As a result of information received from the College that the School of Journalism only admitted students once a year, in the September semester, appellant was forced to postpone her plans to enter the School of Journalism (s. m. 7290-7291).

On February 15, 1949, for the first time since the war, the Civil Service Commission announced an unassembled examination (s. m. 7309) for "intelligence specialists, foreign affairs specialists, historians, social science analysts" (Defendant's Exhibit 84, s. m. 7039-7040, 7388-7390, 7179-7180, 7310-7313) which would have enabled appellant, a war-service appointee, to acquire permanent Civil Service status (s. m. *ibid.*). It is undisputed by the Government that appellant applied to the Civil Service Commission for an application for this examination (s. m. 7179-7180); that she had discussed the examination and the methods of preparing the three work projects called for by the examination with a former office associate of hers then working for the United States Department of State (s. m. 7391, 7392-7393, 7281); and that she had made preparations with her stenographer for typing the extensive application and work

projects necessary for the examination on March 8 or 9, since the examination was due at the latest by March 15 (s. m. 7392-7394).

Appellant's Work in the Foreign Agents Registration Section

Appellant's work as a political analyst in the Foreign Agents Registration Section required that she collect information and prepare memoranda and reports on individuals or organizations who might be or were acting in this country as "agents of foreign principals" and would be registerable under the Foreign Agents Registration Act of 1938 as amended (s. m. 6965-6970). Such "agents" would include individuals or organizations in propaganda, informational, intelligence, lobbying, or other representational activities in this country for "foreign principals", that is, foreign governments (including embassies, consulates or other governmental bodies maintained by foreign governments in the United States), foreign political parties and other foreign groups (*ibid.*). It was appellant's duty to review the statements filed with the Foreign Agents Registration Section by "agents of foreign principals", pursuant to the requirements of the Foreign Agents Registration Act (*ibid.*).

The information which appellant required in her work was provided by the Federal Bureau of Investigation reports and memoranda, newspapers, and other publications, and through liaison with other governmental departments of the United States, particularly the United States Department of State (s. m. 6973-6975). Appellant's work assignments frequently required her to read lengthy F. B. I. reports concerning various individuals and organizations and to make notes and abstracts of the information contained therein (s. m. 7149-7150). It was shown that it was the practice in appellant's office to make such notes on slips of paper, five by eight inches in size, known in the office as

"data slips" (s. m. 251). The making and keeping of such "data slips" for possible future use was a matter solely within the discretion of the appellant or any other analyst (s. m. 7402). These slips were sometimes held by the analysts for future use or, after they had served their purpose, they were frequently destroyed (s. m. 7227-7230).

When appellant entered the Foreign Agents Registration Section in January, 1945, the Section consisted of fifteen political analysts and a similar number of attorneys (s. m. 6924). This number had been so reduced that by March 4, 1949, the Section consisted of just one political analyst, appellant, and one attorney, Nathan B. Lenvin (s. m. 265).

The work of the Section was divided into nationality fields and since at least the end of 1947 appellant performed political analyses in the Eastern European fields—the USSR, Poland, Yugoslavia—and the Latin fields (s. m. 314, 6927). During 1948 appellant also acquired the following nationality fields: Czechoslovakia, Hungary, Bulgaria, Rumania and Greece (s. m. 7137). In addition, since at least the end of 1947, appellant was assigned the field known as "Communist and left-wing affairs" (s. m. 7140-7141). In this connection appellant, in the course of her duties, regularly read, from that time until her arrest, Communist publications such as the Daily Worker, Political Affairs (monthly organ of the Communist Party in the United States), Soviet Russia Today, the USSR Embassy Bulletin, the American Review on the Soviet Union, and the English Sections of Communist-line foreign newspapers published in this country (s. m. 7297). From the latter part of 1947 the appellant wrote summary reports on and made recommendations on organizations to be placed on the Attorney General's subversive list in connection with Executive Order 9835 (s. m. 371-372). Appellant would be called on, from time to time, to provide her supervisor, Mr. Foley, with

information concerning organizations about which regional loyalty review boards made inquiry (s. m. 7141). This latter work continued until the appellant's arrest on March 4 (s. m. 7141-7142).

Appellant, while a member of the Foreign Agents Registration Section, also received assignments in the Internal Security Section, as did other members of the Foreign Agents Registration Section, particularly in those matters involving Communist and subversive activities and matters involving various left-wing minority organizations and individuals associated therewith (s. m. 7140-7141). Mr. Foley, appellant's supervisor, testified that beginning in October, 1948, appellant's work included the reading and studying of Federal Bureau of Investigation reports which were sent to the Internal Security Section and which related principally to activities of Communist organizations and individuals in the United States (designated by the F. B. I. as "Internal Security C" reports) and to activities of individuals and organizations associated with Russian or Eastern European activities (designated as Internal Security-R) (s. m. 261-262).

The Government attempted to show, through Mr. Foley, a dichotomy between the work of the Foreign Agents Registration Section and that of the Internal Security Section (s. m. 264). As a matter of fact the evidence introduced concerning the nature of the functions of the Foreign Agents Registration Section and the Internal Security Section clearly illustrated the intimate connection and relation of the work performed by the two sections and of the reports which were circulated to personnel of the two sections (s. m. 267). It is to be noted that Mr. Foley was chief of both sections (s. m. 294) and that the rooms occupied by the personnel of the two sections were in one continuous series with connecting doors between

the rooms (s. m. 307, 310). The Government also tried to show, through Mr. Foley, that during the latter part of January or early February, 1949, appellant was directed, at a staff meeting, to discontinue reading internal security reports which in the future would be assigned to a Mrs. Rosson who, though not yet assigned to the Internal Security Section, would subsequently be directed to read these reports and send those containing anything of a foreign agents interest to the Foreign Agents Registration Section (s. m. 264 to 267). This testimony of Mr. Foley is flatly contradicted by the Government's own rebuttal witness, Mr. Lenvin, who Mr. Foley testified was present at the conference allegedly called by Mr. Foley (s. m. 264). Mr. Lenvin testified that up to March 4 he had not been told "that Judy (appellant) was no longer to work in internal security, by anybody", including Mr. Foley (s. m. 8055). In her testimony Mrs. Rosson, who began working in the Internal Security Section on February 7, 1949 (s. m. 409) and who, according to Mr. Foley's testimony was to send reports of a foreign agents interest to the Foreign Agents Registration Section, stated that she did "not know anything about the Foreign Registration Act" (s. m. 423).

Appellant testified that while Mr. Foley did relieve her of initially reading these internal security reports for violations of the law, he directed her to ask Mrs. Rosson to supply her with all reports relating to the activities of minority groups in this country and of activities of foreign embassies and consulates and corporations in this country (which latter reports would be designated by Internal Security, followed by the letter of the foreign country involved) so that she might be kept abreast of all information in these reports pertaining to foreign agents (s. m. 7146-7154). Upon finding this method of

work inadequate appellant was later directed by Mr. Foley to read the internal security reports involved very rapidly and to select those having a possible foreign agents interest and then return them to Mrs. Rosson after completion (s. m. 7146-7149). In appellant's open requests to Mrs. Rosson concerning these reports, in her directions to her stenographer to type up data slips from such reports, in her own typing of data slips from these reports, and in her openly leaving such reports on and in her desk and in her file cabinet, appellant made no attempt to conceal the fact that she was regularly reading and working on internal security reports after February 1949 (s. m. 7146-7154).

During her employment in the Foreign Agents Registration Section appellant was considered by her supervisor as "an efficient and hard working person" (s. m. 397) whom he "would recommend for 'Excellent'" efficiency ratings (s. m. 341). It was general knowledge in her office that in order to complete her assignments appellant frequently took work home from her office (s. m. 6926-6927).

The uncontradicted testimony of the appellant was that throughout her entire school and Government career she had never been a member of the Communist party (s. m. 6910) or of any organization designated as subversive by the Attorney General (s. m. 6910). The Court, moreover, stated that there was no suggestion during the trial that appellant had ever been a Communist (s. m. 2382, 2822).

Appellant's Meetings with Gubitchev

Cross examination of the Government witnesses disclosed that the surveillance of appellant was begun during the latter part of December, 1948 and included observation of appellant's movements and activities in Washington,

D. C. as well as in New York City. Although appellant's attorney was not permitted to cross examine the Government's witnesses with respect to the dates and results of the Washington surveillances the Government witnesses admitted that appellant was under surveillance in New York City on January 14, 19, 20, 21, 22, 23, February 18, 19, 21, 22 and March 4, 1949. At the trial, however, the testimony of the Government witnesses was telescoped to three dates, viz., January 14, February 18 and March 4, 1949, on which occasions the appellant admittedly had appointments with Valentine A. Gubitchev, a Russian national employed by the United Nations Secretariat as a $6,600.00 a year construction engineer working on the building of the United Nations Headquarters in New York City (s. m. 6930). No evidence was introduced which even remotely established that Gubitchev was in the employ or acting on behalf of any foreign government as an espionage agent; nor was there any evidence introduced to show that Gubitchev was the possessor of a criminal record of any kind in any country (s. m. 4004).

Appellant first became acquainted with Gubitchev while she was visiting the Museum of Modern Art in New York City during the Labor Day weekend, 1948 (s. m. 6912, 6917). It was while appellant was looking at a cubistic painting that she was engaged in conversation by Gubitchev, who had asked a group of spectators with which appellant was standing their opinion of the painting (s. m. 6919). In the conversation resulting from this initial remark, during which appellant and Gubitchev exchanged opinions as to various other paintings and statuary in the museum, they found that they had a number of interests in common (s. m. 6919, 6920). They both had visited France and had spent time at the Louvre Museum in Paris (s. m. 6929, 6930); both were well-versed and deeply in-

terested in literature, music and the fine arts (s. m. 6945) and, in addition, appellant had made a study of the United Nations organization (where Gubitchev informed her he was employed) in the course of her graduate work at American University in Washington, D. C. (s. m. 7034, 7296). Appellant and Gubitchev, after spending a few hours in the museum conversing and viewing the art objects there, visited a nearby ice cream parlor (s. m. 6938, 6939) at which time appellant, at his request, gave Gubitchev the phone number of her parents' apartment in Brooklyn, where she stayed on her visits to New York, and also her phone number in Washington (s. m. 3941).

From the time she met Gubitchev in September until Christmas Day, 1948, appellant saw Gubitchev in New York City on six different occasions (s. m. 6933). On one of those occasions they spent an afternoon in Central Park and later dined together that evening (s. m. 6941-6942); on another occasion, after meeting at Columbia University, where Gubitchev that day had performed some library research on an engineering problem in connection with his work, they spent the afternoon visiting the Cloisters Museum in Fort Tryon Park, at 193rd Street, in New York City (s. m. 6947-6948); on two other occasions they dined together in Greenwich Village restaurants (s. m. 6945). On Christmas Day appellant and Gubitchev exchanged gifts, she gave him a necktie, which she had purchased in Washington in the company of two office associates, and a box of Toll-House cookies (s. m. 6937, 7566). Gubitchev, who was recovering from a recent operation, gave appellant a large bouquet of flowers (s. m. 6937). In the course of her relationship with Gubitchev before January 14, 1949, Gubitchev told appellant of his love for her (s. m. 6934). Appellant, who from the start of their relationship, had found him "attractive" and "charming," a

"sensitive, intelligent person" with an exceptionally broad knowledge of literature, art and music (s. m. 6945), believed herself also in love with him (s. m. 6934).

After Christmas Day appellant next saw Gubitchev on Friday evening, January 14, 1949. This was the first of the three meetings between appellant and Gubitchev to which Government witnesses testified at great length. On that evening appellant had a seven o'clock appointment to dine with Gubitchev at a downtown New York restaurant. Upon arrival in New York City at five o'clock, appellant phoned Gubitchev at the United Nations and he informed her that he had some work to do with a colleague of his from the United Nations who lived in the Fort Tryon Park area of Washington Heights, a residential area in New York City, and requested her to meet him at the corner of 193rd Street and Broadway at seven o'clock (s. m. 7043, 7044). After freshening up in a leisurely manner in the Pennsylvania Station ladies' room, appellant travelled to the place of appointment by subway and it is undisputed that she met Gubitchev a little after seven P. M. From that moment until the two parted that evening they were under continual surveillance by agents of the F. B. I. Upon meeting, appellant and Gubitchev strolled to an Italian Restaurant, suggested by the latter, located several blocks away at Dyckman Street (s. m. 1029). The couple remained in the restaurant for approximately an hour (s. m. 1030) during which time they dined and conversed. Shortly before leaving the restaurant Gubitchev told appellant that he could not spend the balance of the evening with her because he had to keep an appointment (s. m. 6935, 6936).

As they were preparing to leave the restaurant appellant asked Gubitchev to see her again that weekend and to meet her parents, a request she had previously made

(s. m. 6933-6934). It was at this point that Gubitchev informed her for the first time that he was a married man (s. m. 6933). This unexpected disclosure shocked appellant who felt "astounded," "furious" and "imposed upon" as a result of his having misled her throughout their relationship as to his marital status (s. m. 6934). As they walked to the subway Gubitchev tried to calm appellant by explaining how unhappy he was with his wife and how miserable his life was (s. m. 6934). He told appellant that she was being unreasonable and provincial (s m. 6935). Appellant was visibly upset, had started to cry, and in anger struck at Gubitchev with her hand and with a newspaper which she was carrying (s. m. 6934, 6935).

The testimony of Agents Garde, Robinson, Brennan, Malley and Hradsky, who surveilled appellant and Gubitchev when they left the restaurant, significantly omits mention of the fact that appellant angrily struck Gubitchev several times on their walk to the subway. Their testimony merely indicated that appellant gesticulated with her newspaper at Gubitchev (s. m. 781, 874, 875, 1246). However, the collective report of the surveillance of January 14th, signed by these five agents (Government's Exhibit 79) specifically describes appellant on this occasion as gesticulating "vehemently and on several occasions striking at him (Gubitchev) with her hand and folded newspaper" (s. m. 3686, 3691).

After reaching the subway, appellant, who had regained her self-control, and Gubitchev rode together on the express train until 125th Street, where Gubitchev left to board the local train which was waiting at the station (s. m. 6935, 6936).

The testimony of all the government agents engaged in the surveillance of January 14, 1949, is unequivocal that appellant did not pass anything to Gubitchev and Gubitchev

did not pass anything to appellant (s. m. 6742, 6743). Furthermore, the Court below, after deliberate consideration, specifically and clearly instructed the jury, in its additional charge, that "There was nothing secretive and clandestine about the meeting of January 14" between appellant and Gubitchev (s. m. 8384).

During Inaugural Weekend of 1949 Gubitchev, who had been told on January 14th by appellant that she intended to visit New York at that time (s. m. 7032-7033), telephoned appellant at her parents' home in Brooklyn imploring her to meet him again to furnish him with an opportunity to fully explain his marital status (s. m. 7635-7636, 7033). Appellant, who was still attracted to him, finally consented to see him again (s. m. 7634-7639, 7033) and agreed to meet him when she came to New York on February 18 for the weekend of Washington's Birthday (February 18th through February 22nd) at the same time and place as their previous appointment (s. m. 7033, 7639).

On February 18th appellant's train from Washington was thirty-five minutes late and she arrived at the Pennsylvania Station at approximately six-thirty-five P.M., from which she hurried, hampered by a broken shoe strap, to the uptown subway (s. m. 1032, 1210). Appellant, apparently confusing the Independent subway with the I. R. T. subway that she had previously used, lost her way and asked directions of the surveilling government agents who had accompanied her all the way from the Pennsylvania Station (s. m. 7045). The testimony of the surveilling agents clearly established that the appellant was definitely lost and required directions to find her way to Broadway (s. m. 2095).

While waiting for Gubitchev at the appointed place, appellant entered a nearby shoe repair store where she had her shoe strap fixed (s. m. 1213, 1214). After waiting a

few minutes more for Gubitchev, and wishing to visit a ladies' room, she walked down Broadway to Bickford's Restaurant, which had been recommended to her by the proprietor of the shoe repair store (s. m. 7673-7674, 1057, 1058). She left Bickford's a few minutes later and when she was about a block from the place of her appointment with Gubitchev, she crossed diagonally to the east side of Broadway (s. m. 1216). The evidence is undisputed that on February 18th, as on January 14th and March 4th, appellant, who has been nearsighted since childhood (s. m. 6982) was not wearing her eye glasses. Shortly after she crossed the street, Gubitchev, who had not been seen by appellant, came up to her unexpectedly and surprised appellant by informing her abruptly that he could not see her that evening because he thought his wife had detectives watching him and that he would call her later in the weekend (s. m. 7164). Appellant, in anger, told him not to bother calling and went home (s. m. 7164).

The Government agents testified that on this occasion, as on January 14th, appellant passed nothing to Gubitchev and the latter passed nothing to her (s. m. 4088-4089).

During the latter part of the Washington Birthday weekend Gubitchev again called appellant at her parents' home, apologized for what had happened on their February 18th appointment and pleaded with her to see him again and provide him with a real opportunity to explain his marital situation (s. m. 7111, 7112, 7722, 7723). Since Gubitchev was unwilling to give appellant this explanation on the phone (s. m. 7715) she, being emotionally upset, finally acceded to his request to meet him again at the same place and time on Friday of the March 4th weekend, when she expected to visit New York to take care of some personal matter (s. m. 7112, 7723).

On March 4th appellant left Washington at one P. M. and arrived in New York City at approximately five P. M.

(s. m. 7194). She walked to the 42nd Street station of the Eighth Avenue subway (s. m. 7902), where she boarded an uptown express to 184th Street (s. m. 7195) and proceeded from there to her appointment. While waiting for Gubitchev, who had not appeared, appellant entered a candy store where she had coffee and a piece of pastry (s. m. 7196, 7905). After leaving the candy store, appellant proceeded to Bickford's to use the ladies' room there (s. m. 7197, 7907). She was confused and angry at Gubitchev's failure to meet her and thought of going home but while walking it occurred to her that her appointment might have been for eight o'clock, as that was the actual time that she had met Gubitchev on February 18th (s. m. 7197). With this possibility in mind, after leaving Bickford's, she started back to 193rd Street (*ibid.*). When she was at about 185th Street and Broadway she unexpectedly met Gubitchev, who was walking towards her (s. m. 7198). He told her that he thought he was again being followed by his wife's detectives and asked her to meet him in downtown New York, on 42nd Street and Seventh Avenue, opposite the Times Building (s. m. 7198, 7913). Appellant flared up in disgust, turned away and continued walking north (s. m. 7915). The Government agents testified that after appellant left Gubitchev, he stood looking at her for sometime and then hastened after her until he caught up with her (s. m. , 7918). Gubitchev then again implored appellant to be reasonable and go downtown where he would fully explain things to her (s. m. 7199, 7922). Appellant, emotionally upset but still desiring a satisfactory explanation of her relationship and future with this man, agreed and proceeded to 42nd Street (s. m. 7927), where Gubitchev came up to her and told her to walk to Ninth Avenue, along 42nd Street (s. m. 7204, 7929). As appellant was approaching Ninth Avenue, Gubitchev ran past her saying "come on,

let's catch that bus" (s. m. 7207, 7930) which was at the corner. Agent Murphy testified that the couple boarded the bus together, after waiting for four or five other passengers to enter, but that he did not follow them (s. m. 3319). From the time they entered the bus at 42nd Street appellant and Gubitchev were unobserved by Government agents (s. m. 3319). When seen later on the bus at 22nd Street the couple were seated apart (s. m. 7109). After leaving the bus at 14th Street and Ninth Avenue appellant and Gubitchev proceeded to the subway at Eighth Avenue, with which they travelled on to Third Avenue, which was near Luchow's Restaurant, where the couple intended to dine (s. m. 7118). During the times when they were observed by Government agents in the bus and subway appellant and Gubitchev were not seated together (s. m. 7109). This sitting apart caused appellant to become angry at Gubitchev and when they were leaving the subway she told him that she had travelled around enough, that their sitting apart was ridiculous, and that she was going home (s. m. 7409, 7118-7119). While Gubitchev was attempting to placate appellant the Government agents testified that the couple were "walking at an ordinary pace" (s. m. 4310) and conversing (s. m. 4311) at 15th Street on Third Avenue.

It is undisputed that up to the time when Mr. Granville made the arrest a few seconds later no one had ever seen anything pass between appellant and Gubitchev (s. m. 4088-4089) and no one had been told that they had ever passed anything to each other (s. m. 4119-4120).

The Arrest and Its Preparation

Mr. Granville, the F. B. I. supervisor in charge of the case who made the arrest, testified that he had never participated in any surveillance of appellant or Gubitchev before March 4th (s. m. 3899) and that he saw appellant for the first time at about nine-thirty P. M. on Third Avenue, between 15th and 16th Streets (s. m. 3899). It was clearly established by the Government's own witnesses that immediately prior to the arrest appellant and Gubitchev were walking together at an ordinary pace along Third Avenue engaged in conversation (s. m. 4310, 3900) and had not passed anything to each other (*ibid.*). Granville stated that "within a period of seconds after I saw them, I advised Mr. Scheidt (Chief of the New York Office of the F. B. I., who was also on his first surveillance in this case) that I was going to make an arrest. I pulled the car into the curb and approached the defendant and Gubitchev and advised them * * * that they were under arrest" (s. m. 3901). A few seconds later Agent McCarthy came up and took custody of the appellant (s. m. 3901). Granville, taking custody of Gubitchev, immediately searched him and removed all papers in his possession (s. m. 3902) with the assistance of Agent Carey, who had left Granville's car a few seconds prior to the arrest and who testified he did not know an arrest was about to take place (s. m. 2575, 2581).

Mr. Granville also testified that at the time he made the arrest he was familiar with all previous surveillances of appellant and Gubitchev and knew that no agent had ever seen anything pass between appellant and Gubitchev (s. m. 3988, 3989), nor had Granville himself ever seen anything pass between the two at any time (s. m. 3946, 3947). In fact, the Government conceded that nothing had ever passed between them (s. m. 4314).

Agent Granville further testified that no one had informed him that any conversations between appellant and Gubitchev had been overheard (s. m. 4109) and Government witnesses, whenever asked, denied knowledge of any tapped telephone conversations between appellant and Gubitchev.

It is also clear that at all times, since January, 1949, at least, the Government agents knew the location of appellant's residence in Washington and in New York City, her place of employment, and the names and addresses of her co-workers and her supervisor.

Equally clear is the fact that at all times since January 15th the Government agents knew the identity of Gubitchev, his occupation and place of employment, and the location of his residence (s. m. 2178). Furthermore, it is admitted that neither appellant nor Gubitchev attempted to escape when arrested by the Government agents (s. m. 3947), and there is no evidence that prior to the arrest the parties were attempting to leave New York City.

The preparations on the part of the F. B. I. and the officials of the Department of Justice on March 3rd and March 4th, before the arrest of appellant, are significant. On the afternoon of March 3rd appellant informed her superior, Mr. William E. Foley, that she intended to leave for New York the next day on the one P. M. train (s. m. 8016). Mr. Foley testified that he thereupon communicated this fact to Mr. Fletcher of the F. B. I. (*ibid.*), who directed Agent Lamphere of the F. B. I. to prepare a decoy memorandum to be delivered to appellant (s. m. 5158, 5156). This decoy memorandum, containing fictitious information, was taken by Mr. Fletcher to the Assistant to the Attorney General, Mr. Peyton Ford (s. m. 276) who, in the presence of the co-prosecutor, Mr. Whearty, handed the memorandum to Mr. Foley at about six-thirty P. M. on March 3rd (s. m. 276-277). Mr. Foley testified that

just before handing the decoy memorandum to him Mr. Ford, in Mr. Foley's presence, wrote and initialed on the memorandum the following: "Foley, give this immediate attention, P. F." (s. m. 277, 6389). Mr. Foley testified on cross examination, however, that he never knew, until he read it in the press sometime after the trial had begun, that the memorandum was a decoy and contained fictitious information (s. m. 390, 391, 387, 388).

At a few minutes after nine A. M. on March 4, Mr. Foley testified, he gave appellant the decoy memorandum (Government's Exhibit 13) relating to the Amtorg Trading Corporation[1] (s. m. 280) which he pointedly described to appellant as "quite hot and very interesting" (s. m. 280). Appellant testified that Mr. Foley directed her to make a notation concerning the decoy memorandum, and give the matter some thought over the weekend (s. m. 7127, 7128, 7129). Mr. Foley knew that appellant was taking the one o'clock train to New York that day and advised the Federal Bureau of Investigation as to the hour of her departure (s. m. 6734, 6735, 3973, 3974). This information was communicated to the New York office of the F. B. I. (s. m. 3973), where extensive preparations were undertaken after it was learned that appellant was en route to New York. At three P. M. a conference was held at the F. B. I. headquarters in New York where the agents were carefully briefed (s. m. 3973). More than twenty agents (s. m. 4107), together with seven two-way radio cars, were assigned to surveil appellant and Gubitchev (s. m. 3988, 3990), whereas the surveillances of January 14th and

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1 The decoy memorandum, it should be noted, bore the designation "Internal Security-R" as well as "Registration Act". During the trial the Government had contended that "Internal Security" and "Registration Act" matters were separate and distinct and that appellant had been removed from the former type of work in late January or early February 1949 (s. m. 264, 265).

February 18th were conducted by less than half that number.

Moreover, it was on March 4th that Mr. Granville, the F. B. I. supervisor in charge of the case who was to subsequently make the arrest, for the first time participated in a surveillance in the case, accompanied by Mr. Scheidt, his superior, who was also in his first surveillance (s. m. 4005, 4112).

These extensive preparations assume added significance when considered with the fact that on the afternoon of March 4th Mr. Granville asked Miss Manos, the chief clerk, to stay late that night at F. B. I. headquarters to act as matron for appellant, who was going to be "brought in" (s. m. 961, 963, 964, 965). It was also established that Agent Mendenhall together with another agent, surveilled appellant on the train from Washington, D. C., to New York City on January 14th and February 18th and returned to Washington shortly after arriving at New York on these two dates (s. m. 6495). On March 4th, however, Mendenhall and his companion agent, after surveilling appellant from Washington to New York, did not return to Washington shortly thereafter but reported to the New York Office of the F. B. I. (s. m. 6495-6497), remained in New York overnight, and returned to Washington the morning of March 5th (s. m. 6501) carrying the papers taken from appellant's purse (s. m. 6503) to the F. B. I. laboratory (s. m. 6506).

The co-prosecutor, Mr. Whearty, testified that at one P. M. on March 4th (the very hour that appellant's train departed for New York—eight and a half hours prior to appellant's arrest) he had been officially assigned to the case (s. m. 6747). Mr. Whearty further testified that on March 4th he left Washington on the four P. M. train for New York City and that that evening, shortly before ten P. M., he called the F. B. I. office in New York, was

advised that the arrest had been made, and an F. B. I. car was dispatched to bring him to headquarters (s. m. 2955, 2956). He also testified that the extensive preparations on March 4th, prior to the arrest, even went so far as to include issuance of instructions to him by the Department of Justice in Washington before he left for New York that all press releases relating to the arrest would emanate from Washington (s. m. 6823, 6824).

After Arrest

After the arrest of appellant and Gubitchev had been made they were taken by separate cars to the F. B. I. headquarters. One of the agents took appellant's purse from her, after getting into the car (s. m. 4327) and while in the car he "opened it; looked in; and closed it" but made no further examination of the contents (s. m. 4161). At the F. B. I. office, he placed the purse on a table in the nurse's office (s. m. 4161), where Agent Miller, who testified that the purse did not appear to be "overstuffed" (s. m. 1155) began examination of its contents "almost immediately" after arrival at the F. B. I. office (s. m. 4427). Agent Miller testified that on opening appellant's purse, his first action was to put his hand in the deep flap of the purse and remove therefrom the notation from the decoy memorandum, which appellant had folded into a packet one inch by two inches (s. m. 4617) and had placed in the flap, at the suggestion of Mr. Foley (s. m. 7130-7131). After showing this paper to Mr. Belmont, the Assistant Chief of the New York F. B. I. office, Miller continued his examination of appellant's purse (s. m. 4857, 4617-4618). In addition to the usual items found in a woman's purse, such as cosmetics, comb, bobby pins, wallet, fountain pen, address book, etc., her purse contained some sketches which appellant had made for use in her auto-

biographical novel (s. m. 7350, 7351, 7352) as well as certain papers which appellant intended to work on that weekend in connection with the unassembled Civil Service examination which appellant was preparing for and which had to be filed by March 15th (*supra,* pp. 4-5).

With respect to the autobiographical novel on the Washington scene which she had been working on since August, 1948, and of which she had completed three chapters (s. m. 7328), appellant, for the purpose of obtaining professional advice in the writing of this work, called and made an appointment with a former high school and college friend, Mr. Shimkin, whom she had not seen in six years (s. m. 7989) and who was employed in an editorial capacity by a well known New York publishing firm (s. m. 7984, 7330, 7331). Appellant made this appointment during the Inaugural weekend, January 14th, but subsequently had to cancel it, leaving word with Mr. Shimkin that she would make a future appointment. Mr. Shimkin testified that when the first appointment was made appellant had stated that "she wanted some help and I could be of help to her" (s. m. 7989-7990). She intended to make an appointment with Shimkin during the weekend of March 4th and brought with her character sketches of three of her acquaintances in Washington which she contemplated using in her autobiographical novel and which she wished to discuss with Mr. Shimkin (s. m. 7397). Appellant also had made a note for use in her novel expanding upon a previous reference in her manuscript to the unusual and seeming ludicrous manner in which her superior, Mr. Foley, mentioned and later showed her briefly a so-called "Top Secret" report on Communist activities in the United States (s. m. 7346, 7372). This "Top Secret" report consisted of a lot of old material which had been publicized in the press and which Foley testified contained "a lot of old stuff" (s. m. 291).

The other papers which appellant had in her possession consisted of a number of data slips which appellant intended for use in preparing one of the outlines of the three research projects required by the unassembled Civil Service examination which was due by March 15th (s. m. 7392-7393, 7397). The subjects of the three research projects which appellant had selected to outline for the examination were the Communist Party of the United States, the loyalty program, and informational and intelligence activities of Eastern Europe and Communist groups (s. m. 7394-7395). The data slips in appellant's possession were for her use in the preparation of an outline on the last-named project (s. m. 7403, 7418-7426, 7834-37).

POINT I

The Trial Court erred in denying the motion to dismiss the indictment and in denying the challenge to the array of the petit jury panel for the reason that the Grand Jury which voted the indictment and the petit jury were illegally constituted, in violation of the Fifth and Sixth Amendments of the Constitution of the United States.

Before the commencement of the trial a motion was made on behalf of the appellant to dismiss the indictment and challenge to the array of the petit jury panel upon the ground that the petit jury and the Grand Jury which handed down the indictment were improperly and illegally constituted and selected. The objection made by the appellant was that the Grand Jury included Government employees and the appellant was a Government employee charged with espionage and disloyalty. The motion with respect to the dismissal of the indictment because the

Grand Jury was comprised of Government employees was denied by the Honorable Albert L. Reeves, Trial Judge. The motion to quash and dismiss the entire panel of the petit jury, because it included many Government employees, was also denied by Judge Reeves.

A.

The appellant alleged as a ground of appeal that the Court below erred in denying the motion to dismiss the indictment upon the ground that a majority of the Grand Jurors who indicted the appellant were Government employees.

Title 28 of the United States Code, Section 1862, reads, in part, as follows:

> "The following persons shall be exempt from jury service; * * *
>
> "(3) Public officers in the executive, legislative or judicial branches of the government of the United States, or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties."

The Act of August 22, 1935, which amended the prior provision known as Section 217 of the Code of Law for the District of Columbia approved March 3, 1901 (Code D. C. 1929, Title 18, Section 360), provides as follows:

> "All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the Dis-

trict of Columbia, counselors and attorneys at law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

"All other persons, otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: Provided, That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law."

Said Act of August 22, 1935, is in direct conflict with Section 1862 of the United States Code, Title 28, and permits

Government employees to be included in both the Grand Jury and petit jury panels. In this respect it is contended by the appellant that the Act of August 22, 1935, violates the Fifth and Sixth Amendments to the Constitution of the United States, particularly as applied in the case at bar, where the appellant was employed as a political analyst in the Foreign Agents Registration Section of the Department of Justice and charged with the crime of having taken or copied certain documents, writings and notes containing intelligence reports relating to espionage and counter-espionage activities in the United States, for the purpose of obtaining information respecting the national defense, and with intent and reason to believe that the information was to be used to the injury of the United States and to the advantage of a foreign nation and, in her capacity as an employee of the Department of Justice having custody of certain records filed and deposited with the Department of Justice having wilfully and unlawfully concealed and removed certain of such records and documents containing intelligence reports relating to espionage and counter-espionage activities in the United States, thereby making the United States not merely a nominal party to the prosecution, as in other criminal cases, but an actual party to the prosecution, since the very interests of the United States Government are involved.

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to trial by impartial jury of the state or district wherein the crime shall have been committed. The due process clause of the Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The Fifth Amendment also provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury. The Fifth and Sixth Amendments to the Constitution must be read together in connection with a determination of this point.

At the outset it is important to point out that an impartial jury, as provided for by the Fifth and Sixth Amendments to the Constitution refers to the Grand Jury as well as to the petit jury. A case directly in point is *Ballard* v. *United States,* 329 U. S. 187, 67 Sup. Ct. 261. The indictment in that case was one for using and conspiring to use the mails to defraud. The defendants were found guilty by the Trial Court. A motion was made to quash the indictment and a challenge made to the array of the petit jury because of intentional and systematic exclusion of women from the panel. Both motions were denied and their denial was assigned as error on appeal. The Supreme Court, at page 263, stated as follows:

> "Congress has provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the State. Judicial Code Section 275, 28 U. S. 338; Criminal Code Section 37, 18 U. S. C. Section 88, C. Section 411, 28 U. S. C. A. Section 411. This provision applies to grand as well as petit juries. Congress also has prohibited disqualification of citizens from jury service 'on account of race, color, or previous condition of servitude.' It has required that jurors shall be chosen 'without reference to party affiliations'. It has provided that jurors shall be returned from such parts of the district as the court may direct 'so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district'. None of the specific exemptions which it has created is along the lines of sex."

The Supreme Court, in its opinion, stated that if there was merely involved an instance of the petit jury they would have remanded the cause for a new trial but since the Grand Jury was drawn from a panel improperly chosen they dismissed the indictment. The Supreme Court, in the case of *Ballard* v. *United States, supra,* at page 265, stated as follows:

> "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.
>
> "If, as in the Thiel case, we had merely an instance of a petit jury drawn from an improper panel, we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed."

The finding of the Supreme Court is that it is required, under the law, that the petit jury as well as the Grand Jury must be impartial, otherwise it is improperly chosen.

In reversing the majority opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of *Ballard* v. *United States,* 152 Fed. (2d) 941, the Supreme Court of the United States in effect agreed with the dissenting opinion in that case. Circuit Judge Denman, in his dissenting opinion, at page 950, stated as follows:

> "(B) *It is a violation of the due process clause of the Fifth Amendment and impartial jury clause of the Sixth Amendment for the clerk of the court and the jury commissioner, on the order of the court, to ex-*

clude from the jury lists one-half of all the persons—that is all the women—eligible for the trial of a mother and son on the charge of misrepresenting their religious beliefs and experiences miraculous in character."

Conversely, it is a violation of the due process clause of the Fifth Amendment and impartial jury clause of the Sixth Amendment for the clerk of the court and the jury commissioner to include in the Grand Jury, employees of the Federal Government. Aside from the fact that the Courts must be guided by the provisions of the Fifth and Sixth Amendments to the Constitution with respect to the selection of petit and Grand Juries, the United States Supreme Court has power of supervision over the selection of petit and Grand Juries, and if a Grand Jury or a petit jury is not properly constituted by exclusion of qualified jurors or inclusion of persons who are partial, biased, prejudiced, or otherwise unfit, then the Supreme Court must exercise its power of supervision of the selection of said jurors to guarantee that said jurors are impartial. In *Ballard* v. *United States, supra,* the Supreme Court, at page 263, stated as follows:

"In *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 66 S. Ct. 984, we were presented with a similar problem. It was a civil case which had been removed to the district court on the ground of diversity of citizenship and involved a question of the liability of a common carrier to a passenger. All persons who worked for a daily wage had been deliberately and intentionally excluded from the jury lists. We held, in the exercise of our power of supervision over the administration of justice in the federal courts, see McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819, that the plaintiff's motion to strike the panel should have been granted."

In order to arrive at a proper determination of the question of whether or not the inclusion of Government employees in a Grand Jury is proper where a Government employee is charged with the crime of espionage and disloyalty, it is necessary to analyze and discuss the cases both prior and subsequent to the enactment of the Act of August 22, 1935.

The first important case on this subject is *Crawford* v. *United States,* 212 U. S. 183, 29 Sup. Ct. 260. In that case the defendant was indicted together with two other persons in the Supreme Court of the District of Columbia for a conspiracy to defraud the United States in connection with a contract between the Postal Device & Lock Company, a corporation of the State of New Jersey, and the Postoffice Department of the United States, by which the company was to furnish certain satchels to the Postoffice Department for the use of the letter carriers in the free-delivery system of the Government. The defendant was convicted on certain counts of the indictment. Various questions arose upon the trial of the case. In the course of impanelling the jury one John C. Haley was called as a juror and testified that he was a druggist; that his drugstore was a subpostal station, and that he was the clerk in charge; that he was technically a clerk of the city post office; and that he was paid an annual compensation of $300.00, which included all clerk hire and rental of the premises. Counsel for the defendant then challenged Haley for cause, the objection stated being that he was a salaried officer of the Government. The Court overruled the challenge and Haley sat as a member of the jury and tried the case. The question put before the Court was "Was Haley disqualified to sit as a juror?" The Supreme Court, in reversing the Courts below stated, at pages 264 and 265 as follows:

"A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject.* * * On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

"The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect

such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

It is the confirmed opinion of the writer that the law established by the *Crawford* v. *United States* case, *supra,* still prevails in a case involving a state of facts which are analogous to those in the *Crawford* case. The facts in the case at bar are not only analogous to those in the *Crawford* case, *supra,* but are so exceptional as to particularly warrant the application of the rules of law laid down therein. In the case at bar the appellant was employed as a political analyst with the Foreign Agents Registration Section of the Department of Justice. In the course of her duties the appellant was required to collect information about various political trends in various countries, to write reports summarizing the results of her research, and to submit recommendations based upon her research and reports. In the *Crawford* case, *supra,* the defendant was not even an employee or officer of one of the Government agencies but had been one of the principals involved in a contract with the Government for supplying the Postoffice Department with satchels for letters carriers, and in that connection had entered into a conspiracy to present false bills of account to the Postoffice Department. In the case at bar the appellant is charged with an intent to use information with

respect to espionage and counter-espionage activities of the United States to the injury of the United States and to the advantage of a foreign nation. In the *Crawford* case, *supra,* the defendant was charged with entering into a conspiracy to defraud the United States. In the *Crawford* case the subject of the charge was the obtaining of moneys through false invoices. The subject of the charge in the case at bar is espionage, which is much more serious with respect to its effect upon the United States than the charge involved in the *Crawford* case, *supra.* The juror selected in the *Crawford* case, which resulted in a reversal by the Supreme Court was technically a clerk of the City Post Office at a compensation of $300.00. He was referred to by counsel for the defendant as a salaried officer of the Government and upon that ground counsel for the defendant challenged him for cause. In the case at bar only seventeen members of the Grand Jury voted upon the question of whether the appellant should be indicted (s. m. 51, April 25, 1949). Out of the seventeen members who voted, nine, or a majority thereof, were Government employees. The said Government employees consisted of the following:

Emma Victoria Aiken	Opr., Bur. Ptg. & Eng.
Alexander Anderson	Clerk, State Dept.
James F. Bresnahan	Mach., Navy Dept.
William H. Gruner	Adm. Asst., Dept. of Agr.
Irene M. Kroeger	Sec., Dept. of Army
Dennie B. Ling	Draftsman, Navy Dept.
Lois T. Nothstine	Clk., Dept. of Army
E. L. Raibourne	Acct., Gen. Acctg. Off.
Katherine Mary Wilson	Bur. Eng. & Ptg.

(s. m. 51 to 64, April 25, 1949). It is clear that the majority of the persons voting for the indictment were Government

employees and at least five of these employees who voted for the indictment were connected with the national defense. In the *Crawford* case, *supra,* the Supreme Court held that where some relationship exists between juror and one of the parties, bias is implied and evidence of its actual existence need not be given.

The circumstances and the times make it even more important, in the case at bar, that the jurors selected to sit on the Grand Jury should not be employees of the Government. This must follow from the fact that it was found necessary to enact, on the 21st day of March, 1947, Executive Order 9835 which prescribes the procedure for the administration of a Government employees' loyalty program. Said Executive Order is divided into various subdivisions. The preamble thereof refers to the fact that each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; that it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; that the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; that maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees. Part I of said Order refers to a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government. Part II refers to the investigation of employees, and under the first subdivision thereof states that the head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency; that he shall be responsible for

prescribing and supervising the loyalty determination procedures of his department or agency; and under the second subdivision thereof it is stated that the head of each department and agency shall appoint one or more loyalty boards for the purpose of hearing loyalty cases arising within such department or agency and make recommendations with respect to the removal of any officer or employee. Part III of said Order provides for the responsibilities of Civil Service Commission, in which there shall be established a Loyalty Review Board, who shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty and that there shall be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1949 (s. m. 12 to 21, April 25, 1949).

If the Supreme Court of the United States in the *Crawford* case, *supra,* felt that the inclusion in the jury of a person termed "technically" a postal employee was prejudicial to the defendant and did not constitute the impartiality required by law, then there is far more reason to conclude that the Grand Jury in the case at bar which voted for the indictment, the majority of which were Government employees, did not constitute an impartial Grand Jury as required by law. Could any one reasonably say that a Government employee sitting on this Grand Jury did not fear the implication as to his or her loyalty that a vote against the indictment would entail? Could any one reasonably say that a Government employee sitting as a juror in a case involving the loyalty of a Department of Justice employee was not influenced in his voting by the Executive Order then in existence and by the fact that said Government employee knew that his or her vote against the indictment could be made the subject of investigation

under said Executive Order? Could any one reasonably say that Government employees, in a case involving the loyalty of another Government employee, were not prejudiced in connection with voting for the indictment? Is this the impartial jury guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States? The answer to that question is and must be in the negative. The appellant could not obtain fair, unbiased treatment at the hands of a jury consisting of Government employees where she is charged with being disloyal to the United States.

The cases which hold that the inclusion of Government employees is permissible under the law are not applicable to the case at bar.

In the case of *Wood* v. *United States,* 83 Fed. (2d) 587, the defendant, Wood, was convicted of petit larceny in the Police Court of the District of Columbia. Some of the prospective jurors called were Government employees. Counsel for the defendant challenged each of the prospective jurors individually and collectively for cause, on the ground that each had an interest in the United States which disqualified him to sit in the trial of a criminal case to which the United States was a party. The Court disallowed the challenges. The case was tried and the defendant was convicted. A motion for a new trial was made on the ground that the jury was illegally constituted, which motion was denied, and an appeal was granted because of the importance of the question involved. The Court of Appeals for the District of Columbia discussed the question as to whether in a situation where the United States is a party and employees of the Government are selected as jurors they will necessarily be biased. The Court, after discussing the *Crawford* case, *supra,* stated, at page 591 as follows:

"The ruling made in that case was grounded, not on the statute then in effect, but upon the common-law doctrine of qualification (the court indicating that the statute did not assume to change the common law). But it is well settled, as above pointed out, that at the time of the adoption of the Constitution, the common law concept of qualification was embodied in the Constitution by the use of the phrase, in the Sixth Amendment, 'an impartial jury.' That same doctrine, as we have seen, exists today with equal force, and it is the duty of courts to give it effect and thus preserve the right of an accused to trial by a constitutional jury. And so we think that there is no more right to remove the disqualification of employment in the case of the sovereign than to remove it in the case of the citizen. Whether in the one or the other, the inherent disqualification of interest is a positive bar."

The Supreme Court, in reversing the Court of Appeals, in the case of *United States* v. *Wood,* 299 U. S. 123, 57 Sup. Ct. 177, in its discussion, clearly indicated that in a case of the nature and circumstances involved in the case at bar all Government employees would, of necessity, have to be excluded in order to obtain an impartial jury as required by the Fifth and Sixth Amendments to the Constitution and by the common law doctrine referred to in the *Crawford* case, *supra.* This appears from the following discussion at pages 186 and 187:

"Why should it be assumed that a juror, merely because of employment by the government, would be biased against the accused? In criminal prosecutions the government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested.

It is difficult to see why a government employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be. The instant case is a good illustration. The accused was on trial for theft from a store of a private corporation. Can it be seriously urged that to assure an impartial jury for his trial it is necessary to segregate governmental employees from other citizens of the District upon the theory that the former are biased against him? What possible interest in such a case has a governmental employee different from that of any citizen who wishes to see crime properly punished but is free from any actual bias against the alleged offender? And what appears to be so obviously true in this case of larceny would be true also in criminal prosecutions in general, running the gamut of offenses from murder, burglary, and robbery to cheats and disturbances of the peace. We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."

The nature and circumstances of the crime charged in the case at bar are such that bias must be imputed to Government employees selected as jurors or Grand Jurors. The Supreme Court, in the case of *United States* v. *Wood, supra,* also stated, at page 187, as follows:

"It is suggested that an employee of the government may be apprehensive of the termination of his employment in case he decided in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical."

The enactment of Executive Order 9835 on the 21st day of March, 1947, taken into consideration with the fact that the appellant is charged with being disloyal to the United States and giving information with regard to espionage and counterespionage activities in the United States to a representative of the Russian Government, with which government the relations of this country, in the language of District Judge Reeves, are "strained", makes it clear that the case at bar is such "special and exceptional case" as is referred to by the Supreme Court in *United States* v. *Wood, supra,* and that employees of the Government chosen to sit as jurors may be apprehensive of the termination of their employment in case they decide in favor of the accused.

The *Wood* case, *supra,* must also be distinguished from the case at bar on still another ground. The accused would have no right to challenge, for cause, the members of the Grand Jury. In the case at bar the majority of the members who voted upon the indictment were Government employees. The *Ballard* case, cited *supra,* shows that the only remedy would be by a motion to dismiss the indictment.

The case of *Frazier* v. *United States,* 69 Sup. Ct. 201, is not applicable to the case at bar because it is clear that each case must be decided upon its own facts and the facts in the case at bar are so exceptional that the general rule of law, as referred to in the *Frazier* case, *supra,* do not apply. The defendant in the *Frazier* case, *supra,* was not a Government employee but was charged with a violation of the Narcotics Act. The majority opinion in that case held that the defendant was not deprived of his constitutional rights, as guaranteed by the Sixth Amendment, because his challenge to the jury panel was too late in point of time, that the jury ultimately impaneled was of the defendant's own choosing, and the defendant did not offer any distinct or sworn proof in support of his chal-

lenge. In the *Frazier* case, *supra,* the Court followed the *Wood* case, *supra,* and stated, at page 208, as follows:

> "But the purport of the decision was that the mere fact of Government employment, without more, would be insufficient under the statute's mandate to disqualify a juror."

In the case at bar there is a great deal more than the Government employment of the jurors. The appellant was an employee of the Government, in the Foreign Agents Registration Section of the Department of Justice, and was charged with a serious offense as against the Government, arising out of her employment. This offense not only affects her loyalty to the Government, as an employee, but the Government as such and, more than that, the nature of the charge against her affects the national defense of the United States. In the case at bar there is also the fact that the Government found it necessary to enact Executive Order 9835, which affects each and every Government employee. The nature and circumstances of the case at bar would be sufficient to imply bias and prejudice to Government employees acting as jurors. This is more glaringly illustrated by the dissenting opinion written by Mr. Justice Jackson in the *Frazier* case, and concurred in by three other justices of the Supreme Court, where, at pages 210, 211 and 212, it is stated as follows:

> "On one proposition I should expect trial lawyers to be nearly unanimous; that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts.

"Were the employer an individual, a railroad, an industrial concern, or even a state, I think bias would more readily be implied; but its existence would be no more probable. This criminal trial was an adversary proceeding, with the Government both an actual and nominal litigant. It was the patron and benefactor of the whole jury, plus one juror's wife for good measure. At the same time that it made its plea to them to convict, it had the upper hand of every one of them in matters such as pay and promotion. Of late years, the Government is using its powers as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record are, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to '* * * crook the pregnant hinges of the knee where thrift may follow fawning.' So I reject as spurious any view that government employ-

ment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such jury has a one-sided outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia.

* * * * *

"* * * The short of the thing is: in no case where the court has intervened to use its supervisory power to revise federal jury systems has there been any result so consistently and inevitably prejudicial to one of the litigants as here, under our noses. Ballard v. United States, 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181; Thiel v. Southern Pacific, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412; Glasser v. United States, 315 U. S. 60, 62 S. St. 457, 86 L. Ed. 680. And in cases where a strong minority of the Court has wanted to go so far as to upset a state jury system, as offensive to fundamental consideration of justice spelled out from the due process clause of the Fourteenth Amendment, there has been no such brazen unfairness in actual practice."

Once more this learned Court's attention is called to the fact that even if the prevailing opinion in the *Frazier* case, *supra*, was followed, there would be no opportunity to challenge the composition of the Grand Jury except by a motion to dismiss the indictment after it was handed down.

In the case of *Dennis* v. *United States,* No. 9597, decided October 12, 1948, the United States Court of Appeals for the District of Columbia Circuit affirmed a judgment of conviction. The defendant applied for a writ of certiorari to the United States Supreme Court and certiorari was granted and the appeal is now pending in the United States Supreme Court. One of the questions involved in that appeal is whether the defendant had an impartial jury. The Court of Appeals for this Circuit, in overruling the contentions of the appellant, Dennis, relied upon the cases of *United States* v. *Wood, supra,* and *Frazier* v. *United States, supra.* In that case, too, the defendant Dennis was not a Government employee and there is no question of the composition of the Grand Jury. However, it is most significant to note that the United States Supreme Court, in spite of the decisions in the cases of *United States* v. *Wood, supra,* and *Frazier* v. *United States, supra,* granted the writ of certiorari, indicating that they still considered that there is a serious question to be decided by that Court.

The Constitution of the United States has been termed a flexible instrument. The Constitution has been interpreted by the Supreme Court according to the times during which the Supreme Court sits. This has resulted, over the years, in a change of views and different interpretations of the Constitution by the Supreme Court. The Act of August 22, 1935, at that time, may have been viewed as constitutional and as not depriving a person of an impartial jury. But the same Act, viewed in the light of present conditions, namely, the strained relationship with foreign countries and the great number of subversive, fascist and pro-communist organizations, which necessitated the adoption of Executive Order 9835 and loyalty oaths by employees of the Government, would make the same Act of August 22, 1935, unconstitutional and one

which would deprive a defendant charged with a crime of espionage and disloyalty to the United States of an impartial jury and would deprive that defendant of liberty without due process of law, as guaranteed by the Fifth Amendment to the Constitution.

B.

The appellant alleges as a ground of appeal that the Court below erred in denying appellant's challenge to the array of the petit jury on the ground that the jury lists of the District of Columbia include, to a great extent Government employees. The same argument which is made with respect to the Grand Jury is equally applicable to the composition of the petit jury.

The panel of jurors called in the case at bar is as follows:

Garth L. Beaver,
Government employee, Navy Dept.
Frances V. Benner,
Non-government employee
Henry C. Burrell,
Government employee, Bureau of Engraving
Estoban J. Calderon,
Government employee, Instructor in Acctg. Div.
William Frank Emmett,
Government employee
Joseph Gould,
Non-government employee
John F. Henson,
Government employee, Veterans Bureau
Mary T. Hilton,
Government employee
Adelena M. Howard,
Government employee

Mattie A. Jones,
Non-government employee
Alvin L. Lyons,
Non-government employee
Allen F. Manning,
Government employee, Dept. of State
Elmer L. Meade,
Government employee, Government Printing Office
Frederick A. Meyer
Non-government employee
Elmer H. Miller,
Non-government employee
Clarence Money,
Non-government employee
Andrew H. Norford,
Non-government employee
George W. Pease,
Non-government employee
John W. Pugh,
Non-government employee
Eugene M. Shorter,
Government employee, War Department
Ambrose Shropshire,
Government employee, Navy Dept.
Helen C. Smackum,
City Government employee
Thelma M. Spindle,
Government employee, Internal Revenue Dept.
Mattie E. Taylor,
Retired Government employee
Edward C. J. Van Roon,
Former Government employee
Anna M. Wright,
Government employee, Internal Revenue Dept.

Herman L. Bledsoe,
Non-government employee
George W. Boyce,
Retired Government employee
Liston G. Broadhurst,
Retired City Government employee.

The list shows whether they were Government or non-Government employees. A motion was made, on behalf of the appellant, to exclude, for cause, all of the prospective jurors who were then employed by the United States Government, all who were retired employees of the United States Government, and all who were retired employees receiving compensation from the United States Government. This motion was denied by the Trial Judge (s. m. 257, April 26, 1949). Upon examination it appeared that all Government employees had signed loyalty pledges (s. m. 253, April 26, 1949). The jury as finally constituted were as follows:

Andrew H. Norford,
Non-government employee;
Elmer H. Miller,
Non-government employee;
Henry C. Burrell,
Government employee;
John W. Pugh,
Non-government employee;
Eugene M. Shorter,
Government employee;
Joseph Gould,
Non-government employee;
Helen C. Smackum,
City Government employee;
Edward C. J. Van Roon,
Former Government employee;

Adelena M. Howard,
Government employee;
Mattie A. Jones,
Non-government employee;
Mattie E. Taylor,
Retired Government employee;
Elmer L. Meade,
Government employee;
Herman L. Bledsoe;
Non-government employee;
Liston G. Broadhurst,
Retired City Government employee.

A jury from a panel which consisted of so many Government employees following the Act of August 22, 1935, is not an impartial jury, as guaranteed by the Amendments to the Constitution.

POINT II

The Trial Court erred in denying the motion for the return of the papers and property and to suppress the use thereof, upon the ground that said papers and property were illegally seized from the person of the appellant without warrant or consent.

Before the commencement of the trial a motion was made by the appellant under Rule 41-e of the Federal Rules of Criminal Procedure for the return of the property seized and to suppress for use as evidence anything so obtained upon the ground that the property was illegally seized without warrant or consent. Testimony was taken upon this motion prior to the commencement of the trial. No decision was rendered, the trial was continued, and

near the end of the Government's case said motion was denied.

During the course of the trial a motion was made by the appellant to dismiss the indictment upon various grounds, to wit, (1) that it was not based upon any legal, sufficient and competent evidence; (2) that there was present before the Grand Jury, when other witnesses were present and testified, William E. Foley, Chief of Foreign Agents Registration Section; (3) that there was presented to the Grand Jury papers illegally seized from the person of the appellant without either a warrant of arrest or a search warrant, and when there was no reasonable or probable cause to believe that a crime against the United States had been committed. This motion was likewise denied by the Trial Judge.

The denial of these motions is covered by the appellant's ground of appeal to the effect that the Court erred in denying the appellant's motion to suppress the evidence because the evidence was illegally seized and obtained by the Government, in violation of the search and seizure provision of the Constitution.

Amendment IV to the United States Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

To give effect to this amendment Congress enacted Section 3052 of Title 18, U. S. Code, which reads as follows:

> "The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest."

It is conceded in the case at bar that the arrest was made by an agent of the Federal Bureau of Investigation without a warrant of arrest and that the search was made of the person of the appellant without a search warrant and without the consent of said appellant.

It is the contention of the appellant that the papers seized as a result of the arrest should have been suppressed because the prosecution failed to sustain the burden of proving

1) that there was probable cause to permit an arrest without a warrant;

2) that there was not sufficient time to obtain a warrant before the arrest was made;

3) that there was a likelihood of escape by the appellant before a warrant could be obtained;

It is further contended by the appellant that these requirements of proof are conditions precedent to an arrest without a warrant and the seizure of papers following such an arrest and that the failure of the prosecution to prove any of the three elements outlined render the seizure of the papers illegal.

A.

The person making the arrest did not have reasonable grounds to believe that the appellant was guilty of a felony or that a felony was being committed in his presence.

The surveillance of the appellant by the Government covered twelve separate days, extending over a period from January 14 to March 4, 1949. The testimony of the Government witnesses was limited, however, to three specific dates, namely, January 14, February 18 and March 4, 1949, on which occasions the appellant had appointments with Gubitchev, who was identified as a Russian national employed as an architectural engineer by the U. N., at a salary of $6,000.00 a year. The three appointments of the appellant with Gubitchev were testified to at great length by agents of the F. B. I., who minutely observed each and every action of the appellant with Gubitchev. The agents, as appears in the statement of facts of this brief, traced each and every step of the appellant and Gubitchev in connection with their meetings.

On January 14, 1949, the appellant was surveilled in New York City by six F. B. I. agents. Each of said agents testified on behalf of the Government with regard to said surveillance. Each of said agents testified affirmatively that they saw no papers pass from the appellant to Gubitchev or from Gubitchev to the appellant (s. m. 33, 499, 554, 776, 777, 869, 888, 1127, 2446, 3459, 3739, 4572). Each of the six agents who observed the appellant in the company of Gubitchev testified that they heard no conversation between the appellant and Gubitchev or between the appellant and anyone else (s. m. 588, 589, 733, 782, 783, 800, 872, 877, 1129). There is no testimony whatsoever that the appellant, on January 14th, or prior thereto, removed, copied or took any papers or gave any papers to anybody.

On February 18, 1949, the appellant was under surveillance of eight F. B. I. agents in New York City. Not one of said agents testified that they saw anything pass from the appellant to Gubitchev or from Gubitchev to the appellant, or from the appellant to anyone else. Several of said agents testified specifically that they did not see any papers pass (s. m. 63, 64, 1306, 1364, 2935, 4572). Not one of said agents testified as to any conversation between the appellant and Gubitchev, or the appellant and anyone else on February 18. Certain of said agents testified specifically that they overheard no conversation between the appellant and Gubitchev or between the appellant and anyone else (s. m. 62, 63, 1307). There is no testimony by any agent that the appellant had any papers or that she made any attempt to give any papers to Gubitchev or to anyone else on that day, or that she had removed, copied or taken any papers from the files of the Department of Justice. There is some testimony in the record by Agent Miller that while he had the appellant under surveillance on February 18, in the subway train, he noticed, when the appellant opened her purse, that there was onion-skin paper in her purse with some typewriting on it, but did not know the substance thereof (s. m. 1118, 1119, 1195, 1196). Agent McAndrews was with Agent Miller on February 18 when this alleged observation took place. Agent McAndrews' testimony was to the effect that he believed Miller said that he thought he saw typewriting on the paper but his curiosity was not sufficiently aroused to ask Miller any questions about it (s. m. 926-928, 931).

On March 4, 1949 the appellant was under the surveillance of twenty-one agents. Not one of said agents testified that he saw any papers pass from the appellant to Gubitchev or from Gubitchev to the appellant or from the appellant to anyone else. Not one of said agents testified that they overheard any conversation which would in any

way indicate that the appellant was giving any information to Gubitchev or to anyone else, or attempted to give any information to Gubitchev or anyone else. Certain of said agents specifically testified that they saw no papers pass from the appellant to Gubitchev or from Gubitchev to the appellant on March 4, 1949 (s. m. 16, 65, 66, 180, 888, 1116, 1140, 1141, 1320, 1322, 1326, 1327, 1416, 1417, 1937, 2064, 2065, 2166, 2167, 2306, 2378, 2557, 2793, 3260, 3334, 3335, 3383, 3385, 3532, 3680, 3870, 3871). Certain of said agents testified specifically that they overheard no conversations between the appellant and Gubitchev (s. m. 185, 186, 1140, 1141, 2064, 2065, 2423, 2557, 2587, 3336, 3867, 4109, 4311).

John P. Daly, one of the agents, testified in substance that he had no knowledge on March 4 with respect to the appellant which would warrant an arrest (s. m. 2672, 2862). Robert R. Granville, Supervising Agent in charge of the case, testified that he had no information before the arrest as to whether the appellant had anything in her pocketbook, and had not seen the contents of her pocketbook before the arrest (s. m. 15). Agent Hradsky testified that there was no probable cause to believe that a crime was being committed, or had been committed on either January 14 or February 18, when he had the appellant under surveillance (s. m. 1420, 1421). Agent John F. Malley testified that he had the appellant under surveillance on January 14, when there was no probable cause (s. m. 2347) and on February 18, when an arrest would have been premature (s. m. 2347, 2358, 2359).

It may be inferred from this testimony that the probable cause would have been the passing of papers or documents by the appellant to Gubitchev. No papers passed on March 4th, when the arrest was made, and it must follow that there was no probable cause for making the arrest without the passing of papers or some endeavor to pass papers, or the

actual giving of information by word of mouth by the appellant to Gubitchev, or to anyone else.

Agent Scott Miller also testified that he had the appellant under surveillance and did not arrest the appellant on February 18 because the arrest would have been premature (s. m. 4572) and was never told, between February 18 and March 4, that the appellant met and gave any papers to Gubitchev (s. m. 1144, 1189, 1190). Agent Roger W. Robinson also testified that he made no arrest when he had the appellant under surveillance on February 18 because the arrest would have been premature and the case was not developed (s. m. 1325, 1326). No agent testified as to any fact or as to knowledge of any facts which would show that they, on any day, had reasonable cause to believe that a crime was being committed by the appellant or that a crime had been committed.

The record of the appellant was not of the kind and character to create any suspicion on the part of the Government. Agent Granville testified that he had no information that Gubitchev was ever arrested in his life in this or any other country (s. m. 4003). Agent Malley testified that he was never told that the appellant was ever a member of the Communist party or a member of any subversive organization (s. m. 2382, 2384).

If any probable cause is to be found it must be in the testimony of the arresting officer. The arresting officer was Robert R. Granville. He testified that he had never participated in any surveillance of the appellant or Gubitchev prior to March 4th (s. m. 4005) and that he saw the appellant for the first time when the appellant was walking with Gubitchev between 15th and 16th Streets on the east side of Third Avenue at nine-thirty-five P.M., just prior to making the arrest (s. m. 3899, 3900). Agent Granville testified that he saw nothing pass between appellant and Gubitchev on March 4th (s. m. 16); that he had not been told by any agent

who had the appellant and Gubitchev under surveillance that they had seen anything pass between the appellant and Gubitchev (s. m. 4088, 4089); nor had he been told by any agent who had the appellant or Gubitchev under surveillance that they had ever heard any conversation between the appellant and Gubitchev (s. m. 4109); nor had Agent Granville any information before the arrest as to whether the appellant was carrying anything in her pocketbook, nor had he seen the contents of her pocketbook before the arrest (s. m. 15).

The rule of law respecting arrest without warrant is clearly stated in the case of *Johnson* v. *United States,* 333 U. S. 10, 68 Sup. Ct. 367, where the Court, at pages 369 and 370, stated as follows:

> "The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty."

In the case at bar there was no probable cause to believe that the appellant had committed a crime or was committing a crime in the presence of the officer. The facts and circumstances within the knowledge of the officer were not sufficient in themselves to warrant a man of reasonable caution to believe that an offense had been or was being committed. In the absence of the knowledge of such facts the arrest without a warrant violated the Fourth Amendment to the Constitution on the first requirement, namely, probable cause. To that effect see:

Carroll v. *United States,* 267 U. S. 132, 162, 45 Sup. Ct. 280, 288;
United States v. *DiRe,* 332 U. S. 581, 68 Sup. Ct. 222;
Husty v. *United States,* 282 U. S. 694, 700, 701, 51 Sup. Ct. 240, 241;
Dumbra v. *United States,* 268 U. S. 445, 441, 45 Sup. Ct. 546, 548;
Steele v. *United States,* 267 U. S. 498, 504, 505, 45 Sup. Ct. 414, 416, 417;
Pearson v. *United States* (10th Cir.), 150 Fed. (2d) 219.

Mere hearsay evidence is insufficient to support probable cause. In the case at bar the record is entirely barren of any evidence to support probable cause. Assuming *arguendo* that the arresting officer had some information furnished to him by the surveilling agents which created nothing more than a mere suspicion, that information cannot constitute probable cause for an arrest without a warrant. An arrest without a warrant must be based upon facts within the knowledge of the arresting officer. Good faith of the arresting officer is not sufficient to constitute probable cause. In *Grau* v. *United States,* 287 U. S. 124, 53 Sup. Ct. 38, 40, the Supreme Court, speaking through Mr. Justice Roberts, in an opinion of conciseness and clarity, laid down the rule as follows:

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (Giles v. United States, 1 Cir., 284 F. 208; Wagner v. United States, 8 Cir., 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed. (Steele v. United States, 267 U. S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757.)"

Another case in point is *Director General* v. *Kastenbaum*, 263 U. S. 25, 44 S. Ct. 52, 53, where the Supreme Court stated:

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's Agent, which in the judgment of the court would make his faith reasonable."

It follows *a fortiori* that an officer making an arrest without a warrant must have at least the same knowledge as an officer obtaining a search warrant or a warrant for an arrest.

B.

An arrest without a warrant is illegal, even though the arresting officer had probable cause, if he had sufficient time to obtain the warrant before making the arrest.

The record is clear that the F. B. I. agents knew, on March 4th, when the appellant left Washington, at about one o'clock in the afternoon, that they were going to make the arrest on that day. The arrest was not made until nine-thirty-five P. M. and there was more than ample time to obtain a warrant. As a matter of fact the preparation for the arrest was being made as early as March 3rd, 1949. This is evidenced by the following facts:

(1) Mr. Foley told Fletcher on March 3rd that appellant was going to New York on March 4th (s. m. 8022).

(2) Fletcher on March 3rd, then instructed Lamphere to prepare decoy report information of a deceptive nature (s. m. 5158);

(3) Robert J. Lamphere, an official of the F. B. I. at Washington, on March 3rd prepared a decoy report which he handed to Mr. Foley in the presence of Mr. Whearty with instructions to give it his immediate attention (s. m. 5071).

(4) Mr. Foley, the immediate superior of the appellant, testified that on March 4th, a few minutes after nine A. M., he gave the appellant two memoranda, together with a third memorandum (Government's Exhibit 13) relating to the Amtorg Trading Corporation, which he described as "quite hot and very interesting" (s. m. 280);

(5) Judith Coplon took the one o'clock train from Washington. She was surveilled by Agents Mendenhall and Payne who pointed her out to F. B. I. agents in New York City and then proceeded to the F. B. I. office in New York. On January 14th and February 18th, Mendenhall and Payne after arriving in New York had returned to Washington. After arrest of appellant, Mendenhall and Payne took papers seized from appellant back to Washington on Saturday March 5th (s. m. 6495, 6506).

(6) Raymond P. Whearty, Special Assistant to the Attorney General, testified that it was understood by all officials conducting the investigation with respect to the appellant that the Amtorg report contained information which was partially true and partially false (s. m. 6797);

(7) Raymond P. Whearty also testified that before he left Washington at four P. M. on March 4th Mr. Ford, Assistant to the Attorney General, had told him that all news releases with respect to the Coplon matter, if any, would be handled through Washington (s. m. 6823);

(8) Sappho Manos, a clerk in the office of the F. B. I. in New York City, testified that on March 4th, before five-thirty P. M., Agent Granville asked whether she was willing to act as matron for appellant and told her that the appellant was being brought in (s. m. 960 to 964);

(9) Agent Granville testified that at about three P. M. on March 4th he had a conference in the Federal Building, Foley Square, New York City, with various agents assigned to the case; this conference lasted until three-thirty P. M. (s. m. 3988); he knew then that the appellant was arriving from Washington (s. m. 3973); at his conference seven cars (s. m. 3989, 3890) and approximately twenty-one agents had been assigned to the case (s. m. 4107); Agent Granville also discussed at that time the possibility of an arrest and it was agreed that Mr. Scheidt, Special Agent in charge of the New York F. B. I. Office, would accompany Granville (s. m. 4112).

(10) After arrest the pocketbook of appellant was opened at F. B. I. headquarters in New York by Agent Miller and paper containing handwriting on both sides (from decoy Amtorg Report) was taken by him from purse (s. m. 4587, 4617, Government's Exhibit 70).

It is clear that the F. B. I. agents made all preparations to make the arrest that day and they had sufficient opportunity and time to obtain a warrant of arrest. The extensive preparations made by the F. B. I. agents showed their intention to make the arrest that day and an arrest made without a warrant under those circumstances is illegal and violates the Fourth Amendment to the Constitution, even though there was probable cause.

The most recent cases decided by the Supreme Court of the United States are to the effect that an arrest or search and seizure without a warrant is illegal if the arresting

officers had sufficient time to obtain a warrant, even though they had probable cause. The most recent case is *McDonald* v. *United States,* 69 Sup. Ct. 191, decided December 13, 1948, wherein the Court, at page 193, stated as follows:

> "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances, as we held in Johnson v. United States, supra. We will not assume that where a defendant has been under surveillance for months, no search warrant could have been obtained. What showing these officers made when they applied on the earlier occasions, the dates of these applications, and all the circumstances bearing upon the necessity to make this search without a warrant are absent from this record. We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily. * * *
>
> "* * * No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement, as we held in Johnson v. United States, supra, 333 U. S. at page 15, 68 S. Ct. at page 369."

The following language at page 192 of the *McDonald* case, *supra,* is particularly applicable to the case at bar:

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law. They had been following McDonald and keeping him under surveillance for two months at this rooming house. The prosecution now

> tells us that the police had no probable cause for obtaining a warrant until, shortly before the arrest, they heard the sound of the adding machine coming from the rooming house. And there is vague and general testimony in the record that on previous occasions the officers had sought search warrants but had been denied them. But those statements alone do not lay the proper foundation for dispensing with a search warrant."

In the *McDonald* case, *supra,* even though the arrest was held legal, nevertheless the Supreme Court suppressed the evidence obtained without a search warrant. In that case the arrest was held legal only because the officers "observed McDonald in the act of committing an offense" and "they were under a duty then and there to arrest him". In the case at bar the officers making the arrest did not observe the appellant in the act of committing an offense and the arrest, without a warrant, was therefore illegal.

In *Trupiano* v. *United States,* 334 United States 699, 68 Sup. Ct. 1229, Mr. Justice Murphy, in delivering the opinion of the Court, stated at the outset that that case added another chapter to the body of law growing out of the Fourth Amendment to the Constitution of the United States. In that case a Federal Agent knew at nine P. M. of the evening of June 3rd that a raid upon certain premises was scheduled for that night. Three agents arrived at the premises at about eleven-forty-five P. M. and one of the agents, looking through an open door, could see a still column, a boiler, and a gasoline pump in operation. He entered the building and had arrested the person found there and thereupon seized the illicit distillery. It was held that the arrest was legal because the crime was committed in the very presence of the officer but nevertheless the motion to suppress the evidence was granted since the agent engaged in the raid

without securing a search warrant or warrants of arrest. The Court, in the *Trupiano* case, *supra,* stated at page 1233 as follows:

> "And so when the agents of the Alcohol Tax Unit decided to dispense with a search warrant and to take matters into their own hands, they did precisely what the Fourth Amendment was designed to outlaw. Uninhibited by any limitations that might have been contained in a warrant, they descended upon the distillery in a midnight raid. Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present."

In the *Trupiano* case, *supra,* the Court refused to follow the case of *Harris* v. *United States,* 331 U. S. 145, 67 Sup. Ct. 1098, and stated, at page 1234, as follows:

> "But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. Carroll v. United States, supra, 267 U. S. at page 158, 45 S. Ct. at page 287. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant. In the case before us, however, no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no

reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated."

In the case at bar the arrest was illegal because no crime was committed in the presence of the arresting agent and the Federal Agents had adequate opportunity to obtain a warrant of arrest before the arrest was made. Consequently, the seizure of the papers from the appellant after the arrest was illegal. See also *United States* v. *Johnson,* cited *supra.*

C.

There was no likelihood of escape by the appellant before a warrant could be obtained for her arrest and therefore the arrest was illegal.

The Government failed to offer any evidence whatsoever to show that there was a likelihood of the appellant's escape before a warrant could be obtained. The appellant was under surveillance of the agents from the time she left Washington until the time she arrived in New York and practically at all times thereafter until the arrest was made.

Section 3052 of Title 18, U. S. Code, has introduced a further condition precedent to the making of an arrest by an F. B. I. agent without a warrant. That condition precedent is to the effect that there must be a likelihood of escape by the defendant before a warrant could be obtained. It should be noted at the outset that the power of an F. B. I. agent to make an arrest is even more limited than the power of an ordinary police officer. The restriction here is statutory and it is limited to an F. B. I. agent. In the case at bar the arrest was made by an F. B. I. agent. A case in point is *United States of America* v. *Haberkorn,* 149 Fed. (2d) 720, in which the Court, at page 721, stated as follows:

" 'The * * * agents * * * of the Federal Bureau of Investigation * * * are empowered to * * * make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases *where the person making the arrest has reasonable grounds to believe * * * there is a likelihood of the person escaping before a warrant can be obtained for his arrest,* but the person arrested shall be immediately taken before a committing officer.'

"It is evident from a mere reading of the statute that the power of an F. B. I. agent to make an arrest, without a warrant, is a limited one.

"We are unable, in the absence of positive, affirmative proof, to conclude that the appellant, an attorney, with an established office, is one of whom it can be said, 'there is a likelihood of the person escaping before a warrant can be obtained for his arrest.' It would, of course, not be impossible for a practicing attorney to be about to flee from punishment for a serious crime, and if the Federal Agent had knowledge which would plausibly lead him to the belief of the likelihood of escape, the particular objection to the validity of the search would disappear. The facts do not disclose such a situation. In fact, the agents had actually obtained a warrant—but obtained it a short time too soon, before the act constituting the crime had been committed. There was nothing to preclude the obtaining of a new, a valid warrant, upon the information which their informer had given.

"We are unable, under any legitimate construction of this statute, to uphold the search by the F. B. I. agent upon the facts here disclosed."

Another case in point is *In re Fried,* 161 Fed. (2d) 453, where the Court, at pages 460, 461, stated as follows:

> "The privileges and immunities of citizens created by the Fourth and Fifth Amendments to the Constitution undoubtedly, at times impede the apprehension and conviction of criminals. Further obstacles of that kind have been erected by the F. B. I. statute, 5 U. S. C. A. Sec. 300a which, by imposing limits on the investigatory methods lawfully available to the F. B. I., extends the citizens' immunities. Since Congress is the constitutional agency empowered to create such new immunities by enacting statutes, I think the restrictions put on official behavior by that statute deserve as much respect from the courts as the constitutionally-imposed restrictions."

At all times since January 1949, the Government agents knew the location of appellant's residence in Washington and in New York City and her places of employment. There is no evidence that prior to the arrest the appellant was attempting or had made any plans to leave either her New York City or Washington residences.

D.

It is elementary that the fruits of an illegal search may not be used for the purpose of proving that there was probable cause for making the arrest.

In *Johnson* v. *United States, supra,* Justice Jackson stated, at page 370, as follows:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."

In *United States* v. *Di Re,* cited *supra,* Justice Jackson, at pages 228 and 229, stated as follows:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Another case directly in point is *Byars* v. *United States,* 273 U. S. 28, 47 Sup. Ct. 248. In that case the defendant was convicted in the District Court for unlawfully having in his possession, with fraudulent intent, certain counterfeit stamps. The stamps were found in the possession of the defendant. The Supreme Court of the United States reversed the conviction upon the grounds urged by the writer in connection with the instant case stating, at pages 248 and 249, as follows:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. (Citing cases.)"

It follows, therefore, that even if the search of the defendant Judith Coplon was "successful", the evidence so obtained cannot be used against her.

Another case precisely enunciating this principle of law is *United States* v. *Duane,* 66 Fed. Supp. 459, where the Court, at page 462, stated as follows:

> "The defendant correctly contends that, in support of his belief that the law is being violated, the officer is limited to his knowledge with which he initiates the search and that he may not sustain it upon the basis of the discovery of what he seeks in an otherwise illegal search. The mere vindication of a suspicion or guess will not suffice. (Citing cases.)"

The Government in its affidavit in opposition to the motion to suppress the evidence in order to justify the arrest set forth the contents of the papers seized from the appellant after the arrest. This is the very thing that Justice Jackson said, "will not do" in the *Di Re* case cited *supra.*

The papers seized from the appellant should have been suppressed and the indictment based upon papers seized as a result of an arrest without a warrant should have been dismissed since the Government failed to prove the three conditions precedent to the making of an arrest without a warrant and the subsequent seizure of papers.

POINT III

The evidence was insufficient to sustain the verdict as to either count of the indictment and the Court below erred in denying the motion to dismiss the indictment and in refusing to direct a verdict of not guilty at the end of the Government's case in chief.

At the conclusion of the Government's case in chief motions were made to dismiss the indictment and for a directed verdict of acquittal upon various grounds, to wit: that the evidence was insufficient to sustain the verdict of guilty as to either count; that the evidence was insufficient to establish a violation of Sections 793 and 2071, Title 18 of the U. S. Code; and that there was a fatal variance between the testimony offered by the Government and the charges alleged in the indictment. These motions and the argument in connection therewith appear *in extenso* at s. m. 6471 to 6479.

The appellant, as a ground for appeal, alleged that the Trial Court erred in denying the appellant's motion to dismiss the indictment at the close of the Government's proof on the ground that the Government failed to produce proof sufficient to show the commission of a crime. The appellant also alleged, as a ground for appeal, that the Trial Court erred in denying the appellant's motion for a directed verdict of not guilty.

A discussion of this point on appeal requires a statement of the statutes under which the appellant was indicted. Count I of the indictment is stated to be a violation of Section 793 of Title 18, United States Code, which reads as follows:

> "Whoever, for the purpose of obtaining information respecting the national defense with intent or reason

to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned, or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any other prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army or Navy is being prepared or constructed or stored, information as to which the President has determined would be prejudicial to the national defense; or

"Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

POINT III

The evidence was insufficient to sustain the verdict as to either count of the indictment and the Court below erred in denying the motion to dismiss the indictment and in refusing to direct a verdict of not guilty at the end of the Government's case in chief.

At the conclusion of the Government's case in chief motions were made to dismiss the indictment and for a directed verdict of acquittal upon various grounds, to wit: that the evidence was insufficient to sustain the verdict of guilty as to either count; that the evidence was insufficient to establish a violation of Sections 793 and 2071, Title 18 of the U. S. Code; and that there was a fatal variance between the testimony offered by the Government and the charges alleged in the indictment. These motions and the argument in connection therewith appear *in extenso* at s. m. 6471 to 6479.

The appellant, as a ground for appeal, alleged that the Trial Court erred in denying the appellant's motion to dismiss the indictment at the close of the Government's proof on the ground that the Government failed to produce proof sufficient to show the commission of a crime. The appellant also alleged, as a ground for appeal, that the Trial Court erred in denying the appellant's motion for a directed verdict of not guilty.

A discussion of this point on appeal requires a statement of the statutes under which the appellant was indicted. Count I of the indictment is stated to be a violation of Section 793 of Title 18, United States Code, which reads as follows:

> "Whoever, for the purpose of obtaining information respecting the national defense with intent or reason

to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned, or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any other prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army or Navy is being prepared or constructed or stored, information as to which the President has determined would be prejudicial to the national defense; or

"Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

"Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter; or

"Whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

"Whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 2071 of Title 18, U. S. Code, upon which Count II of the indictment is based, reads as follows:

> "(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.
>
> "(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States."

A.

The Government's failure to offer proof of transmittal or communication of information or an attempt of transmittal or communication of information to a person not entitled to receive same required the dismissal of Count I of the indictment.

The indictment does not specifically state under which paragraph of Section 793 the alleged crime in the case at bar was committed. An analysis of Section 793 shows that the only paragraph which could be applicable to the appellant is the fourth paragraph. The first three paragraphs of Section 793 cannot apply to the appellant because under those three paragraphs the Government

would be required to establish that the appellant copied documents or made extracts from certain documents "for the purpose of obtaining information respecting the national defense * * *." The appellant could not, within the wording of Count I, have copied, taken, made or obtained documents, writings and notes for "the purpose of obtaining information" respecting the national defense because the appellant was in possession of the information which had come to her attention in the regular course of her employment as a political analyst in the Foreign Registration Section of the Department of Justice. The Government does not question the fact that the appellant obtained possession of the information lawfully. As a matter of fact, the Government established, as part of its case, that the data slips which the appellant had in her possession were prepared by her as part of her duties and in the course of her employment. The appellant did not copy anything for the purpose of obtaining information within the language of the first three paragraphs of Section 793 in view of the fact that the information was in her possession and came into her possession by reason of her employment and the carrying out of her duties as a political analyst in the Foreign Registration Section of the Department of Justice. Having that information, as an employee of the Government, the only paragraph of Section 793 which could be applicable to her is the fourth paragraph which makes a person guilty of a crime under that section if one, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any documents, etc., relating to the national defense, willfully communicates or transmits, or attempts to communicate or transmit, the same to any person not entitled to receive the same. The fourth paragraph of Section 793 was included in the law to cover employees of the Government who obtained information in the course of their employ-

ment. A reading of Count I indicates that it is not based upon the fourth paragraph of Section 793.

Count II of the indictment emphasizes the appellant's argument. Under Count II it is alleged that during the period between December 10, 1948 and March 4, 1949, the appellant, being an employee of the Department of Justice and, in such capacity, having custody of records, documents and papers filed and deposited with the Department of Justice, did wilfully and unlawfully conceal and remove certain of such records and documents, relating to espionage and counterespionage activities in the United States. The second count conclusively shows that the appellant had information and received it as an employee and, if a crime was committed at all, it must have been under the fourth paragraph of Section 793 and could not have been under the first three paragraphs. She received the information in her capacity as an employee. What she subsequently did with the information is another matter and that is covered by the fourth paragraph of Section 793.

Count I of the indictment should therefore have been dismissed by the Trial Court because the Government failed to prove that the appellant communicated or attempted to communicate the information to a person not entitled to receive the same. This would have been necessary under the fourth paragraph of Section 793 and the failure to establish those facts required a dismissal of Count I of the indictment.

B.

The failure of the Government to prove that the information as represented by the data slips was connected with the national defense required a dismissal of Count I of the indictment and a directed verdict in favor of the appellant upon said count.

During the course of the prosecution of this case, twenty-two data slips were offered in evidence. These exhibits were marked 90a to 111, inclusive. With respect to twelve additional data slips, the Government refused to offer them in evidence, alleging that these data slips contained information which was wholly confidential and should not be made public since their disclosure would be of harmful effect to the United States. The Trial Court, however, stated with respect to those twelve data slips, that "They do not suggest danger to our national security or our national defense" (s. m. 5008). If the twelve data slips which the prosecution thought contained such information as would affect the national defense were held by the Court not to be of that character, then it is plain that the twenty-two other data slips admitted in evidence likewise do not suggest danger to our national security or our national defense.

The appellant was employed in the Foreign Registration Section of the Department of Justice. The data slips were made from reports which were made for the Foreign Registration Section of the Department of Justice. That department is not related to the national defense; it is not a branch of the army, navy or air force. There is no prohibition in the criminal statutes against disclosing information affecting the Government which does not deal with the army, navy or air force, or a department directly connected with any of them.

A case bearing on this subject, and in which there was an exhaustive discussion of Section 32, Title 50, U. S. Code (from which Section 793, Title 18, U. S. Code was evolved) is *United States* v. *Heine,* 151 Fed. (2d) 313 (2nd Circuit). In that case Heine was indicted on the espionage count and convicted after trial. His acts took place prior to the entry of the United States into World War II. The defendant was a German national working in this country and was engaged in collecting all available information about our production of airplanes. The Circuit Court of Appeals reversed the conviction upon the ground that the information collected was information which the Armed Services had themselves made public. However, in discussing the statute, the Circuit Court made a very pertinent observation with respect to what was meant by national defense. The Court in that respect, at page 815, stated as follows:

> "It seems plain that the section cannot cover information about all those activities which become tributary to 'the national defense' in time of war; for in modern war there are none which do not."

The Court then proceeds to describe the various activities relating to national defense in time of war. The inference to be drawn from this language is that if this statute is to apply in times of peace to information in departments other than the army, navy or air force, then the section must cover those activities which Congress, in its opinion, considers to be tributary to the national defense. In the absence of such information being included in the statute, the statute must be given a narrow interpretation and limited by its terms to the army, navy and air force departments.

The information contained in the data slips in the case at bar, given the most liberal interpretation, cannot be considered as relating to the army, navy or air force departments or to the military, naval or air force establishments. These reports were given to the Foreign Agents Registration Section and there is nothing to show that they have any connection with the work of army, navy or air force intelligence.

The leading case on this subject, and the only case decided by the United States Supreme Court is *Gorin* v. *United States,* 312 U. S. 19, 61 Sup. Ct. 429. Two of the defendants in that case were convicted of a violation of the Espionage Act. The proof indicated that Gorin, a citizen of Russia, acted as its agent in gathering information. He sought and obtained from one Salich reports relating chiefly to Japanese activities in the United States. These reports were in the files of the Naval Intelligence branch office. The defendants objected to the conviction principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the Act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the Act unconstitutional as violative of the due process clause because of indefiniteness. The Supreme Court, in referring to national defense, stated, at page 434, as follows:

> "National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related

> activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning."

The Supreme Court, in the *Gorin* case, *supra,* stated that the reports relating to Japanese activities in the United States "gave a detailed picture of the counterespionage work of the Naval Intelligence, drawn from its own files." Such reports, the Supreme Court stated, "must be considered as dealing with activities of the military forces." The reports in the case at bar, from which excerpts were made, are not reports of the navy, army or air force intelligence.

C.

At the close of the Prosecution's case in chief the appellant was entitled to a dismissal of Count I of the indictment and a direction of a verdict because of insufficiency of evidence, as a matter of law, to prove the guilt of the appellant.

The prosecution, in order to prove an intent on the part of the appellant to use the information obtained for the purpose of injuring the United States, or to the advantage of a foreign nation, relied upon the circumstances under which the meetings between the appellant and Gubitchev took place and the exhibits which were introduced in evidence, which were seized from the appellant after the arrest. The gravamen of the offense under Section 793 is the intent that the information be used to the injury of the United States or to the advantage of a foreign nation. The Government in endeavoring to establish this intent, relied upon inferences rather than facts.

The first inference that would have to be drawn in order to establish an intent is that the meetings with Gubitchev

were for the purpose of obtaining information concerning the national defense. The second inference is that the appellant took these data slips for the purpose of giving them to Gubitchev. The third inference is that Gubitchev was a foreign agent engaged in espionage. The fourth inference is that Gubitchev, if he obtained any information, would transmit it to the country of which he is a national. The law is well settled that an inference cannot be based upon another inference to establish any fact. To that effect see:

United States v. *Ross,* 92 U. S. 281, 285, 23 L. Ed. 707;

Brady v. *United States,* 24 Fed. (2d) 399, 404;

Freeman v. *United States,* 20 Fed. (2d) 748;

Looney v. *Metropolitan Railroad Company,* 200 U. S. 480, 487, 488, 26 Sup. Ct. 303, 50 L. Ed. 564;

Manning v. *Insurance Company,* 100 U. S. 693, 699, 25 L. Ed. 761;

Lincoln National Life Insurance Co. v. *Erikson,* 42 Fed. (2d) 997, 1002;

General Reinsurance Co. v. *Southern Surety Co.,* 27 Fed. (2d) 265, 272, 273;

United States v. *Carr,* 132 U. S. 644, 653, 10 Sup. Ct. 182, 33 L. Ed. 483.

There was no proof offered of any attempt to give information to Gubitchev, of the giving of any information to Gubitchev, that Gubitchev was engaged by the Russian Government as an espionage agent, or that Gubitchev was anything more than an architectural engineer employed by the U. N. at a salary of $6,000.00 a year.

D.

The Government failed to prove that the papers seized from appellant were filed and deposited with the Department of Justice and Count II should have been dismissed.

Count II of the indictment is based upon subdivision (a) of Section 2071, Title 18, U. S. Code. As a result of what is claimed by the appellant to be an illegal arrest, there were seized from the appellant various papers, consisting of thirty-four data slips, several character sketches, and an excerpt from a decoy report. It is conceded that the character sketches are the appellant's personal papers and do not come within Section 2071. The prosecution has not alleged, or contended during the course of the trial, that the excerpt from the decoy report was a filed paper or that Count II of the indictment is predicated upon that excerpt. The question narrows itself as to whether the thirty-four data slips were filed and deposited with the Department of Justice, within the meaning of the language of Count II of the indictment. The burden is upon the prosecution to prove, beyond a reasonable doubt, that the data slips in question were filed in the office of the Department of Justice or with a public officer of the United States.

A reading of the statute clearly shows that in order to come within Section 2071(a) the papers must be filed in the office of the Department of Justice. Depositing the paper with a clerk or employee of the Department of Justice does not bring it within the statute. A paper deposited with a clerk or officer of any court of the United States would be covered by the statute, but the filing or depositing of the papers with a clerk or employee of the Department of Justice, as distinguished from the actual filing of the paper with the official filing clerk or in the official files of the

Department of Justice does not come within the statute. The statute makes this distinction by using the words "filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States." The data slips in evidence do not contain any filing stamp of the Department of Justice or of any other department. It is elementary that every paper filed in any department of the United States has endorsed on it at least the date of such filing.

The omission of any date of filing from the data slips in question raises the presumption that they were not filed papers. The Government, in its endeavor to establish that the papers were filed and deposited in a public office, failed to overcome that presumption. William E. Foley, Chief of the Foreign Agents Registration Section, testified that the "data slips were used by the analysts of the section in order to prepare memoranda and reports for the attorney in the section or for me" (s. m. 258, 259, April 29, 1949). This testimony of Mr. Foley, considered in the light of the presumption that all filed papers should have a "filed" stamp on them establishes conclusively that these data slips were not filed papers within the meaning of Section 2071. As a matter of fact, Mr. Foley, in another part of his testimony, shows that these data slips were personal memoranda and were not papers filed or deposited with the office of the Department of Justice. Mr. Foley testified that when any matter of interest to possible foreign agent's registration came up which an analyst might want to use in briefing an attorney, that information would be put on the data slips of the Foreign Agents Registration Section (s. m. 259, April 29, 1949). Mr. Foley nowhere in his testimony stated that the data slips were filed in the office of the Department of Justice.

Ruth E. Rosson, another witness on behalf of the Government, testified with respect to this subject to the effect that it was her duty to examine certain F. B. I. reports and unless they were referred to Mr. Foley she would mark the report "File," with her initials, and send it to the Division of Records for filing (s. m. 409, 411, 412, April 29, 1949).

Unless there is some testimony on behalf of the Government that the data slips were filed in the Division of Records, they could not be classified by anyone as having been filed and deposited in a public office. It appears from the testimony submitted by the Government that data slips were kept by the various employees in their respective offices and they were never deposited or filed in the Division of Records, which is the official filing bureau of the Department of Justice. The fact that the data slips were kept in a cabinet in their office or in an adjoining office, as appears from the testimony of Mr. Foley (s. m. 247 to 249, April 29, 1949) does not give them the character of being papers filed and deposited in a public office. More particularly, it is significant to note that there is no testimony anywhere in the record, on behalf of the Government, that the thirty-four data slips were ever filed in the office of the Division of Records or anywhere else. What were filed with the Division of Records were the F. B. I. reports. The appellant is not accused of taking any F. B. I. reports and she is not accused, under Count II, of taking copies of reports. She is accused of taking away papers filed and deposited in a public office. The copying of papers in a public office cannot constitute a crime under Section 2071.

Inasmuch as the Government failed to establish the crime as charged in Count II of the indictment beyond a reasonable doubt, Count II should have been dismissed at the conclusion of the Government's case in chief.

POINT IV

The Court erred in denying the motion for a directed verdict of not guilty at the end of the entire case.

At the conclusion of the entire case, motions were made for a directed verdict of acquittal upon various grounds. These motions were denied (s. m. 8126 to 8139, inclusive). Motions were also made at the time of the sentence to set aside the verdict upon the same grounds. These motions were also denied (s. m. 8465 to 8471, inclusive).

The appellant, in her grounds for appeal, states that the Court erred in denying the appellant's motion for a directed verdict of "not guilty" upon the ground that there was no evidence in the case upon which a jury could find that appellant had committed any crime and that the Court erred in denying the appellant's motion made after the verdict, to set aside the verdict, upon the ground that the verdict was contrary to the evidence, against the weight of the evidence, and contrary to law.

As indicated in the grounds for appeal, the appellant maintains that the evidence was insufficient, as a matter of law, upon which a jury could find the appellant guilty beyond a reasonable doubt. Accordingly, the writer briefly adverts to the principles of law which control the Trial Judge on the motion for a directed verdict (judgment of acquittal) and the law which serves as a guide to this Court in determining the sufficiency of the evidence. It is respectfully submitted that the statement of facts prefacing the legal argument and also the discussion of the facts under Point II of this brief lay before this Court the position of counsel as to the facts. It is contended that

the evidence did not establish the appellant guilty of the crimes charged in the respective counts of the indictment. In the interests of brevity the facts will not be reargued.

The law is well settled that unless there is substantial evidence of facts which excluded every other hypothesis but that of guilt it is the duty of the Trial Judge to return a verdict for the accused.

Hammond v. *United States* (D. C.), 127 Fed. (2d) 752;
Parnell v. *United States,* 64 Fed. (2d) 324;
Moore v. *United States,* 56 Fed. (2d) 794;
Nicola v. *United States,* 72 Fed. (2d) 780;
Paul v. *United States,* 79 Fed. (2d) 561;
Read v. *United States,* 42 Fed. (2d) 636;
Gargotta v. *United States,* 77 Fed. (2d) 977;
Tinsley v. *United States,* 43 Fed. (2d) 890;
West v. *United States,* 68 Fed. (2d) 96;
Leslie v. *United States,* 43 Fed. (2d) 288;
Grant v. *United States,* 49 Fed. (2d) 118;
Terry v. *United States,* 7 Fed. (2d) 28;
Nosowitz v. *United States,* 282 Fed. 575.

The foregoing citations all seem to hold that as to the appellate function the rule is that where all of the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse the judgment against the defendant. In this connection we point in particular to the decisions in

Hammond v. *United States, supra;*
Warner v. *United States,* 60 Fed. (2d) 700;
Williams v. *United States* (D. C.), 140 Fed. (2d) 351.

Since *Hammond* v. *United States, supra,* is a District of Columbia Court of Appeals case, we are quoting from page 753 thereof, where it is stated as follows:

> "In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.' Isbell v. United States, 8 Cir., 227 F. 788, 792."

In the case at bar there were some suspicious circumstances but there is nothing which rises to the dignity of proof in a criminal case, which requires proof of the elements of the crime beyond a reasonable doubt.

In *Lopez* v. *Campbell,* 163 N. Y. 340, the New York Court of Appeals said, at pages 347, 348, as follows:

> "Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. In other words, it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. As has been said: 'Insufficient evidence is, in the eyes of the law, no evidence.'" (Cases cited.)

The rule of law that "insufficient evidence is, in the eyes of the law, no evidence," was cited with approval in *Matter*

of Case, 214 N. Y. 199, 203 (per Cardozo, *J.*), and in *People* v. *Galbo,* 218 N. Y. 283, 292. See also:

Nosowitz v. *United States,* cited *supra;*
Reed v. *United States,* 51 Fed. (2d) 941;
Graceffo v. *United States,* 46 Fed. (2d) 852;
Karchmer v. *United States,* 61 Fed. (2d) 623;
United States v. *Buchalter,* 88 Fed. (2d) 625, 626.

All of these cases hold that where there is no substantial and convincing evidence to overcome the presumption of innocence, it is error to deny defendant's motion to dismiss the indictment and for directed verdict of acquittal.

POINT V

The Court committed serious errors in its charge to the jury and in its refusals to charge.

The appellant, in her grounds for appeal, stated that the Court erred in instructing the jury that the papers found in her possession were likely to injure the United States; that such papers were connected with the national defense or the national security; that there was no substantial dispute of the facts; that the meetings between the appellant and Gubitchev were secret and clandestine; that the papers found in the appellant's possession were records, documents and papers filed and deposited with the Department of Justice. The appellant's grounds for appeal also stated that the Court erred in refusing to instruct the jury as requested by the appellant.

A.

The Court charged the jury that there can be no controversy in the case but that the appellant did copy and take certain documents, writings and notes which contained information connected with the national defense (s. m. 8362).

The Court charged the jury that the *only* question for them to determine, on the first count, was whether the appellant took such documents, writings and notes with the intention and with the reason to believe that the information contained therein was to be used to the injury of the United States and to the advantage of a foreign country (s. m. 8363).

The Court charged the jury that it cannot be disputed that the data slips did contain information related to or connected with the national defense (s. m. 8368).

Exceptions to said charges appear at s.m. 8377 to 8383, inclusive.

The Court had been requested to charge the appellant's Fifth Request, as follows (s. m. 8318, 8319):

> "5. The alleged violation charged in Count I of the indictment contains four elements, all of which must be established by the Government beyond any reasonable doubt, namely:
>
> "(a) The fact of copying, taking, making and obtaining documents, writings and notes containing intelligence reports relating to espionage and counter-espionage activities in the United States, which documents, writings and reports were part of the official files and records of the Department of Justice;

"(b) That the purpose of copying, taking, making and obtaining said documents, writings and notes was the obtaining of information respecting the national defense;

* * * * *

"(d) That the information so obtained must, in fact, have related to the national defense."

The Court had been requested to charge the appellant's Sixth Request, as follows (s. m. 8319):

"6. That a necessary element of Section 793 of Title 18, United States Code, the alleged violation of which the defendant is charged with under Count I of the indictment, is that the documents, writings and notes mentioned in that section are connected with the national defense."

The Court had been requested to charge the appellant's Seventh Request, as follows (s.m. 8319):

"7. That if you find that the papers found in the defendant's purse were not connected with the national defense then it will be your duty to bring in a verdict of not guilty on the first count of the indictment."

The Court had been requested to charge the appellant's Eighth, Ninth, Tenth and Eleventh Requests as follows (s. m. 8319, 8320):

"8. That for the purpose of prosecution under Section 793 of Title 18, United States Code, the documents, writings and notes mentioned in this statute must be connected with the places or things mentioned in the

statute and must directly relate to the efficiency and effectiveness of the operations of said places or things as instrumentalities for defending our nation."

"9. That in the second place the information, documents, or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation."

"10. That the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States. That connection must not be a strained one nor an arbitrary one. The relation must be reasonable and direct."

"11. That if you find that the defendant did copy any papers but that such copying was not for the purpose of obtaining information respecting national defense, it will be your duty to bring in a verdict of not guilty on the first count of the indictment."

All of these requests were refused.

The Court, it appears, charged, as a matter of law, that the papers related to the national defense and took that question away from the jury. The requests were entirely proper and in accordance with the established law.

In *Gorin* v. *United States, supra,* the defendants were convicted of a violation of the Espionage Act. The Supreme Court, at page 436, stated as follows:

"The function of the court is to instruct as to the kind of information which is violative of the statute and of the jury to decide whether the information

> secured is of the defined kind. It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.[16]"

The Trial Judge in the *Gorin* case, *supra,* gave instructions upon which the appellant patterned the requests hereinabove referred to. The requests in the *Gorin* case, *supra,* are set out at pages 435 and 436. The Supreme Court, with respect to said requests, stated, at page 436, as follows:

> "These quotations show that the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense. We are of the opinion this was properly left to the jury."

As a matter of fact, in the *Gorin* case, *supra,* the defendants contended that the Court should have held, as a matter of law, that the reports, upon their face, show that they do not relate to the national defense and the Trial Court should have so held as a matter of law. The Supreme Court affirmed the decision of the Court below and held that the question was one of fact and not one for the Court.

Another case directly in point is *Pierce* v. *United States,* 252 U. S. 239, 40 Sup. Ct. 205, wherein the Court, at pages 209 and 210 stated as follows:

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16 *Grand Trunk Ry.* v. *Ives,* 144 U. S. 408, 417, 12 S. Ct. 679, 682, 36 L. Ed. 485; *Gunning* v. *Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720. *Cf. Dunlop* v. *United States,* 165 U. S. 486, 500, 501, 17 S. Ct. 375, 380, 41 L. Ed. 799.

"What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide.

* * * * *

"Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution. Schenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 208, 39 Sup Ct. 249, 63 L. Ed. 561; Debs v. United States, 249 U. S. 211, 215, 39 Sup. Ct. 252, 63 L. Ed. 566."

B.

The Court charged the jury that "another object to our Constitution and our Government is, to 'insure domestic tranquility' " and that "this is essential for the peace and well-being of our citizens." The Court also charged that "to secure both of these objectives, the one providing for the common defense, and the other insuring domestic tranquility, the Congress properly enacted * * * " the statutes upon which the indictment was predicated, describing the statutes (s. m. 8360, 8361). Exception was taken to said charge (s. m. 8382).

In the case of *Gorin* v. *United States,* cited *supra,* the Court had the duty to interpret the statute but the Trial

Court's interpretation of the statute was erroneous since the statute was not enacted to insure domestic tranquility but was merely to cover our national defense.

In the case of *Gorin* v. *United States* (C. C. A.), 111 Fed. (2d) 712, the Court stated that the words "national defense" are similar to the words "common defense" as used in Section 8, Article I of the Constitution. Nowhere does it appear that the words national defense could be interpreted to the extent of including "domestic tranquility."

C.

The Court charged the jury that the intent of the appellant could be determined only by circumstantial evidence (s. m. 8366). In the first place intention could be established not only by circumstantial evidence but also by direct evidence. By these instructions, the Court excluded from the jury's consideration the testimony given by the appellant as to her reasons for having the papers in her possession at the time of the arrest.

The Court's statement in that part of the charge that the circumstantial evidence must be clear and convincing and point with moral certainty to the guilt of the accused, and by their force exclude from and be inconsistent with every reasonable hypothesis of the innocence of the accused (s. m. 8367) was not sufficient nor adequate to instruct a jury of laymen as to how to weigh circumstantial evidence in arriving at a determination. That the jury was confused by this charge is established by the fact that after it had been deliberating for eight hours it came back and sought further instructions on the subject of intent (s. m. 8413 to 8420, inclusive). It should be noted that the Court, at this point, refused to charge that the burden is upon the Government to establish intent beyond a reasonable doubt (s. m. 8407, 8408).

D.

The Court charged the jury that the appellant was having clandestine meetings with the Russian national, Gubitchev (s. m. 8368). The Court also charged the jury that the clandestine nature of the meetings between Gubitchev and the appellant is admitted (s. m. 8372). The Court charged the jury that there is no dispute but that the appellant and Gubitchev met secretively and cautiously and that their conduct was designed to deceive casual observers (s. m. 8374). Exception was duly taken to this part of the charge (s. m. 8376). The Court subsequently corrected himself by stating that he referred to the three meetings of January 14th, February 18th and March 4th as being clandestine and secret and that he wanted to modify that statement by saying that the meeting of January 18th was not secret and clandestine (s. m. 8384). It is well settled that inference to be drawn from testimony must be left to the jury.

Rendleman v. *United States,* 38 Fed. (2d) 779;
Curley v. *United States,* 160 Fed. (2d) 229, 232,
cert. den. 67 Sup. Ct. 1511, 331 U. S. 837.

E.

The Court charged the jury that from the evidence in the case they could easily conclude that the information contained in the data slips could be used to the advantage of a foreign country and to the injury of this country (s. m. 8368). That again was a matter, in the language of *Gorin* v. *United States, supra,* that should have been left to the determination of the jury. By stating that the jury

could easily conclude that the information could be used to the advantage of a foreign country he trespassed upon the right of the jury to be the sole judges of the facts. To that effect see *Pierce* v. *United States, supra.*

F.

The Court charged the jury that if they should find that it was the appellant's purpose to deliver such data slips to Gubitchev, the Russian national, then they should ask themselves the question what her purpose was in delivering such data slips to him and to what use he would put them if not for use advantageous to Russia, of which he was a subject and citizen, and to the injury of the United States (s. m. 8368, 8369). It is to be remembered that the Court has already charged the jury that the appellant's intention to give the data slips to Gubitchev could be inferred from the circumstances under which they met, etc. This creates one inference. In this part of the charge the Court states that the jury could then conclude that if she intended to give the data slips to Gubitchev they could then infer from that that Gubitchev intended to use it for the advantage of Russia and to the injury of the United States. This is the inference upon inference referred to under Point III-C of this brief.

In addition to the cases cited under Point III-C, the case of *Simon* v. *United States,* 78 Fed. (2d) 454 is also in point. The Court, in that case, at page 456, stated in substance that an attempt to establish a fact by merely one inference upon another does not constitute substantial evidence to submit to a jury, citing *Pennsylvania Railroad Co.* v. *Chamberlain,* 288 U. S. 333, 53 Sup. Ct. 391.

G.

The Court charged the jury that on Count II there is no question that the appellant had the data slips mentioned in evidence in her possession and that the same had been removed from the files of the Department of Justice (s. m. 8370). Exception was taken to this charge (s. m. 8380, 8381).

The appellant requested the Court to charge her Twenty-Seventh and Twenty-Eighth Requests, as follows (s. m. 8324):

> "27. If you find that the papers found in the defendant's purse were not records, documents or papers filed and deposited with the Department of Justice, then it is your duty to bring in a verdict of not guilty on the second count of the indictment."
>
> "28. That if the notes found in the defendant's purse were only copies or excerpts taken from original records, documents or papers, then it is your duty to bring in a verdict of not guilty on the second count of the indictment."

The Court refused to charge in each instance.

In the first place, it is contended by the appellant that the prosecution offered no credible evidence to support the charge that the data slips were taken from the files of the Department of Justice. Giving the evidence the most favorable interpretation to the Government, the most that can be said is that there was an issue of fact created as to whether or not the data slips were papers which had been filed with the Department of Justice, within the meaning of Section 2071, United States Code, Title 18. This was a question which was for the jury to determine

and the withdrawal of this issue from the jury was serious error prejudicial to the appellant.

In *United States* v. *Gollin,* 166 Fed. (2d) 123, cert. den. 68 Sup. Ct. 905, the Court held that even though the defendant does not dispute certain facts testified to by the prosecution, if those facts are material and required to be proven by the prosecution, it would be error for the Court to instruct the jury on these facts, as a matter of law, and would amount to a partially directed verdict.

H.

The Court had been requested to charge the appellant's Sixteenth and Eighteenth Requests, as follows (s. m. 8321, 8322):

> "16. If you find that the defendant, as an employee of the Department of Justice being entrusted with the documents, writings and notes, had the information as to the contents thereof in her possession, then the copying of certain excerpts from said documents, writings and notes could not, as a matter of law, have been done for the purpose of obtaining information respecting the national defense, within the meaning of Count I of the indictment."
>
> "18. That there is no evidence whatsoever in this case that the defendant attempted to transmit any documents, writings or notes of any kind to any person."

These were entirely proper requests and the argument supporting these requests is fully set forth under Point III-A of this brief.

I.

Appellant's Thirty-Sixth and Thirty-Seventh Requests relate to the conclusion which must be drawn from evidence which is susceptible of interpretation of either guilt or innocence (s. m. 8327). These instructions were not given in the form requested but were modified in such way as to nullify the entire effect of such requests. As given they were cryptic and too vague. That the charges should have been given in the form as requested is supported by such cases as

Becher v. *United States,* 5 Fed. (2d) 45;
Vernon v. *United States,* 146 Fed. 121;
Isbell v. *United States,* 227 Fed. 793.

J.

Appellant's Thirty-Eighth Request relates to the fact that the defendant was entitled to have the Government establish each fact and each circumstance essential to the commission of the crime beyond reasonable doubt (s. m. 8328). The Court refused so to charge.

The Court was requested to charge the appellant's Thirty-Ninth Request, as follows (s. m. 8328):

> "39. So, if in your opinion, the evidence introduced by the prosecution is only sufficient to raise a conjecture or a suspicion unfavorable to the accused, it is not such evidence as would justify you in rendering a verdict of guilty, and it is your duty, under such circumstances, which I charge you, as a matter of law, to acquit the defendant."

The refusal of the Court to so charge was prejudicial to the appellant. *United States* v. *Mickel,* 157 Fed. 229.

K.

The Court, in its charge to the jury, stated as follows (s. m. 8371, 8372):

> "In this connection it was her testimony that one of the officers under whom she worked instructed her to take one of the documents with her on the trip to New York and that he knew, and others in the party knew, that she did have in her possession other documents, and, if, with this knowledge, they caused her to be accused, then on this count of the indictment such acts on the part of the Government's agent would be entrapment and under such circumstances you would return a verdict of not guilty. It is the law that if agents or officers of the Government induced her to remove such documents for the purpose of lodging a charge against her, then such an act or acts would be an entrapment. This is so for the reason that a person cannot be convicted of crime for acts incited or instigated by persons representing the Government, and who did so for the purpose of procuring a conviction. The government produced the persons, who, defendant said, either knew that she was taking such documents or data slips out of the offices of the Department of Justice and instructed her to do so in the case of one handwritten data slip, and they each denied the statements of the defendant."

This part of the charge was incomplete, misleading and too confusing for the jury to understand. Exception was taken to said charge by counsel for the appellant (s. m. 8377-78). The appellant was entitled to have her theory of entrapment clearly presented to the jury:

Bird v. *United States,* 180 U. S. 356, 361, 21 Sup. Ct. 403, 45 L. Ed. 570;
Bollenbach v. *United States,* 326 U. S. 607, 66 Sup. Ct. 402;
Thomas v. *United States,* 151 Fed. (2d) 183.

Was the charge with respect to entrapment so presented?

The Court erroneously stated that the appellant testified that one of the officers under whom she worked and others in the party (referring to the F. B. I. agents who were making the surveillance) knew that she had in her possession other documents. There was nothing in the appellant's testimony, or in the testimony of any other witness, that one of the officers under whom the appellant worked, or any F. B. I. agent, prior to her arrest, knew that the appellant had anything in her pocketbook except an excerpt from the decoy Amtorg report.

The Court, in his charge, stated that if one of the officers under whom the appellant worked instructed her to take one of the documents with her to New York, knowing that she had other documents in her possession, such act on the part of the Government would be an entrapment because a person cannot be convicted of a crime for acts incited or instigated by persons representing the Government. In other words, the Court charged in effect that if the jury disbelieved the testimony of the appellant with regard to instructions to take the decoy Amtorg report with her to New York then there was no entrapment. The Court clearly did not complete the charge on the law of entrapment. This omission was highly prejudicial to the appellant.

The Court failed to charge, however, that even if the jury disbelieved the testimony of the appellant with respect to taking the decoy Amtorg report into New York

with her, there would still be entrapment if the Jury found that the Government had no probable cause to believe that the appellant was engaged in criminal activities at the time that they entered into the scheme and artifice to entrap her. It is well settled that the Government may legally use artifice or scheme to entrap only when it has reasonable cause to believe that the law is being violated by the defendant.

Mitchell v. *United States,* 143 Fed. (2d) 953, 957.

In *Sorrells* v. *United States,* 287 U. S. 435, 53 Sup. Ct. 210, 212, the Court held that artifice and stratagem may be employed to catch those engaged in criminal enterprises. In the case at bar the Government did not have probable cause to believe, prior to preparing the decoy report, that the appellant was engaged in criminal enterprises and therefore what the Government did was clearly entrapment, which required a dismissal of the indictment.

United States v. *Healy,* 202 Fed. 349;
Voves v. *United States,* 249 Fed. 191.

A correct statement may be found in the case of *United States* v. *Becker,* 62 Fed. (2d) 1007, 1008, where Judge Learned Hand, following the case of *Sorrells* v. *United States* (*supra*), stated as follows:

> "However, it has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance of a uniform series."

In the case at bar the Government had no reasonable or probable cause to believe, prior to preparing the decoy report, that the appellant was continuously engaged in criminal activities.

Convictions were reversed under these circumstances in cases such as:

> *Butts* v. *United States,* 273 Fed. 35;
> *O'Brien* v. *United States,* 51 Fed. (2d) 674, 680;
> *Morei* v. *United States,* 127 Fed. (2d) 827.

The charge was misleading and erroneous in another respect. The Court, nowhere in the charge, referred to the document as a "decoy" report. The Government conceded, through the testimony of Mr. Lamphere and Mr. Whearty, that the document to which the Government referred was a decoy report prepared for the sole purpose of tricking the appellant. The defense of entrapment depended, to a great extent, upon the question of whether the document referred to by the Court in its charge was a decoy report. In other words, even if the jury disbelieved the appellant as to the instruction to remove the document, nevertheless, if the document was, and it is uncontradicted that it was, a decoy report, then the jury could still find entrapment if the Government did not have probable cause to believe that the appellant was engaged in criminal activities.

POINT VI

Appellant was denied a fair and impartial trial by jury because of the misconduct of the prosecution and the prejudicial errors committed by the Court in the admission of certain evidence.

The appellant, as a ground for appeal, alleges that the Court erred in receiving evidence extraneous to the issues and highly prejudicial to the appellant.

Counsel for the prosecution was guilty of prejudicial misconduct in asking certain questions on cross examination of the appellant, and the Court erred in overruling the objections to such questions.

A.

Mr. Kelley, on cross examination, referred to a report which was marked as Government Exhibit 166 for identification and asked the appellant what it is. The appellant testified that it is the report of the Royal Commission of Canada to investigate the facts relating to and circumstances surrounding the communication by public officials and other persons in position of trust of secret and confidential information to agents of a foreign power (s. m. 7882 and 7883).

Mr. Kelley then asked the appellant whether the book (referring to Government Exhibit 166 for identification), recites that the Canadian Officials secured a secret Russian document which outlined the information the Russian Espionage System wanted in relation to possible Canadian recruits for further espionage (s. m. 7884).

Mr. Kelley then asked the appellant the following questions:

"Q. I direct your attention to this portion:

'While this document refers only to two men, it is an excellent example of the system employed in cases of men that it was hoped to recruit by this means.'

And as to the data in relation to recruits, I now direct your attention to page 51:

'(a) Age, parents, family conditions.

'(c) Party affiliation, attitudes the politics of King.

'(d) Financial conditions, inclinations toward establishing material security for his family (intentions to engage in business, to own a car, a home of his own and what hinders the fulfillment of this plan).

'(e) Attitude towards our country and her politics.

'(f) Wherein does he see the prosperity of Canada (in friendship with America or in retaining English influence).'

And lastly:

'Personal positive and negative sides.'"

Counsel for the appellant then objected to this question and to the line of questions, and the objection was overruled (s. m. 7887), and the appellant proceeded to answer questions concerning Government's Exhibit 166 for identification.

The Royal Canadian report was never offered in evidence by the prosecution. It was entirely irrelevant and immaterial. It had no possible connection with the issues in the case at bar.

The Government's Exhibit 166 for identification dealt with Russian Espionage System in Canada. To refer to that document with respect to the appellant in itself, was highly prejudicial. It is apparently for that reason that the prosecution never offered it in evidence. The attempt to put in evidence indirectly what could not be done directly, constituted misconduct. An able and experienced trial lawyer like Mr. Kelley knew or should have known, that he could not read information contained in the so-called Royal Canadian Report in the guise of asking questions. An example of that is found at page 7884, where Mr. Kelley states "the book recites, does it not," and then proceeds to read from the report. Another example of this is found at page 7885 wherein Kelley starts with the words "I direct your attention to this portion" and proceeds to read what appears to be a full page in the minutes. That the reference to this Royal Canadian report and the reading of excerpts therefrom and the asking of questions based on said report which was never offered in evidence and had no possible connection with the case at bar were highly prejudicial, is evidenced by the fact that the jury after having started its deliberations came back and asked for the Royal Canadian report.

Counsel for appellant in referring to the Royal Canadian report, stated as follows: "As to number 4, the Blue Book

on Russian Espionage, we have agreed that this Blue Book was never offered in evidence. Therefore, under the circumstances, they cannot see it."

The Court did not permit the jury to see the said Royal Canadian report.

The prejudice to the appellant however, resulted from the questions asked by Kelley with respect to the report and from the Court's overruling of the objection to these questions. That is clear from the request of the jury to see Government Exhibit 166 for identification. It appears conclusively that the questions with respect to the Government's Exhibit 166 for identification and the exhibit itself were considered by the jury in its deliberation upon the question of whether the appellant was guilty or not guilty.

The language in *Miller* v. *Territory of Oklahoma,* 149 Fed. 330, 339, is particularly apposite:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial Court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the Appellate Court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the

defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

B.

During the cross examination of the appellant Mr. Kelley asked various questions of the appellant, as follows (s. m. 7476, 7477, 7478):

"Q. Is it not the truth that just one week prior to that date, prior to January 14, which would be the night of January 7, you spent the night in room 412, in the Southern Hotel, in Baltimore, Maryland, while registered with a man under the name of Mr. and Mrs. H. P. Shapiro, from 122 Burnside Avenue, East Hartford, Connecticut?

* * * * *

"Q. The 8th day of January you spent the night in room 1523 of the Bellevue-Stratford Hotel in Philadelphia, Pennsylvania, while registered with the same man, under the name of Mr. and Mrs. H. P. Shapiro?

* * * * *

"Q. Did you not spend New Year's Eve of this year with Mr. Shapiro, in fornication, in an apartment of a friend of his in this city? A. I did not."

It appears that Mr. Shapiro, the person referred to by the prosecution in its questions is an attorney employed by the Department of Justice under Mr. Whearty, the co-prosecutor (s. m. 7647). Counsel to the appellant objected and his objections were overruled (s. m. 7477). The appellant unequivocally denied that she spent the night in fornication with Mr. Shapiro (s. m. 7478, 7480). However, Mr. Kelley, in order to prove that point, insisted in putting into evidence Government's Exhibits 156 and 157, which

purportedly showed that there was a registration in the name of "Mr. and Mrs. H. P. Shapiro, 122 Burnside Avenue, East Hartford, Connecticut", on January 7th, 1949, and a registration in the same name on January 8th (s. m. 7484 to 7486, inc.). These were admitted over the objection of counsel for the appellant. Mr. Kelley cross examined the appellant further with regard to her answers in order to show that she did spend nights with Mr. Shapiro in fornication. The purpose of introducing this evidence was not made known, and such cross examination of the appellant was not admissible for any purpose.

Fornication is a crime in the District of Columbia. Cross examination of the appellant by the prosecution on the subject of fornication, knowing that the appellant had never been convicted of the crime of fornication, was highly improper on the part of the prosecution and extremely prejudicial to the appellant.

A case on all fours in this District supporting the contention of the appellant, is *Pyle* v. *United States,* 156 Fed. (2d) 852. In that case the defendant, Mary J. Pyle, during a two weeks' visit in Washington, met and became immorally intimate with Chalmers H. Laubaugh, the operator of a pool room. After she returned to Texas Laubaugh visited her there and asked her to return to Washington with him and marry him. She accompanied him to Washington and lived with him as his wife without going through a marriage ceremony. This continued for several months, when she returned to Texas. During all this time Laubaugh was also intimate with a woman named Shirley Shelton, and at least some of the money which Laubaugh spent in maintaining the defendant, Mary J. Pyle, was given to him by the Shelton woman from her earnings as a prostitute. The Shelton woman went to Anderson, Indiana, and wrote to Laubaugh for funds so that she might return to Wash-

ington. Laubaugh, however, went to Indiana and brought the Shelton woman back to Washington. After he returned the defendant left for Texas and while there two agents of the F. B. I. called upon her to obtain a statement from her concerning the activities of Laubaugh. The F. B. I. was then assembling evidence which resulted in the indictment of Laubaugh on a charge of unlawfully transporting the Shelton woman from Indiana to Washington for immoral purposes. The defendant then made a statement to the F. B. I. concerning her visits to and life in Washington and concerning Laubaugh's relations with the Shelton woman. During the course of the trial of the case against Laubaugh Mary Pyle took the stand and testified that she had signed the statement because of the threats of the F. B. I. agents, although she did not repudiate it. Because of her testimony at the trial she was indicted for perjury and charged with having testified falsely in saying that the statement given to the agents by her was signed involuntarily. The defendant was convicted. Upon appeal the defendant assigned as error the admission in evidence of a teletype message charging her with having committed fornication. In reversing the conviction this Court, at page 855, stated as follows:

> "Without deciding that the teletype message was otherwise admissible, we hold that it was error to receive it because it accused the appellant of having been guilty of fornication with Laubaugh in Washington, which is a criminal offense in the District of Columbia.
>
> "In O'Brien v. United States, this court said:
>
> " 'We have said in a number of cases that distinct and different crimes independent of that charged may not be used to establish guilt. Borum v. United States, 61 App. D. C. 4, 6, 56 F. 2d 301. And we have also

> said that, when such evidence is admitted and shown in the record, we will presume it to be injurious. Parlton v. United States, 64 App. D. C. 169, 173, 75 F. 2d 772.' The word 'crime,' as commonly understood in this jurisdiction, includes both felonies and misdemeanors. To receive evidence in a criminal trial to the effect that the defendant has committed a misdemeanor wholly foreign to the charge then under inquiry is equally as erroneous as to admit evidence of the commission of an unrelated felony."

In the *Pyle* case, cited *supra,* the Government introduced a teletype message for the purpose of contradicting the defendant and to show that the defendant made the statement to the F. B. I. voluntarily. In the case at bar the cross examination with regard to the alleged fornication is unrelated to the charge of espionage as set forth in the indictment.

The credibility of a defendant who has testified may be impeached only in the same manner and to the same extent as any other witness and no further.

> *Raffel* v. *United States,* 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054;
> *Fitzpatrick* v. *United States,* 178 U. S. 304, 315, 20 S. Ct. 944, 44 L. Ed. 1078;
> *Reagan* v. *United States,* 157 U. S. 301, 305, 15 S. Ct. 610, 39 L. Ed. 709.

The appellant in the case at bar denied any act of fornication. The attempt of the prosecution to contradict that testimony is contrary to law and is reversible error. To that effect see:

Pullman Co. v. *Hall,* 55 Fed. (2d) 139, 141;
Wigmore on Evidence, 2nd Edition, Vol. 2, Section 982, *et seq.;*
Greenleaf on Evidence, Lewis' Edition, Sec. 459.

Cross examination of the appellant on the question of alleged fornication was a violation of the rights of the appellant and is reversible error. In *Gidcon* v. *United States,* 52 Fed. (2d) 426, the Court, at page 430, stated:

> "And again (page 52 of 169 F.): 'The party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error.' See, also, Resurrection Gold. Min. Co. v. Fortune Gold Min. Co., 129 F. 668 (C. C. A. 8); Heard v. United States, 255 F. 829, 833 (C. C. A. 8); Tucker v. United States, 5 F. (2d) 818, 823 (C. C. A. 8); Havener v. United States, 15 F. (2d) 503, 506 (C. C. A. 8)."

The conclusion is inescapable that the cross examination by the prosecution of the appellant on the subject of fornication, which is a crime in the District of Columbia, was calculated to humiliate and degrade the appellant and, inasmuch as such testimony was not admissible, the cross examination constituted reversible error. See also:

Templeton v. *United States,* 151 Fed. (2d) 706, 707.

It is the duty of the Court to protect the appellant from questions which go beyond the bounds of proper cross examination merely to harass and annoy or humiliate.

See: *Alford* v. *United States,* 282 U. S. 687, 694, 51 Sup. Ct. 218, 220, 75 L. Ed. 624;
United States v. *Katz,* 78 Fed. Supp. 435, 439.

C.

During the course of the trial five F. B. I. agents testified to the surveillance made by them on January 14th, 1949. Counsel for the appellant requested that the surveillance notes be produced by the prosecution. This request was denied by the Court (s. m. 649). After the trial had proceeded for approximately another month, and after various F. B. I. agents had testified, the Court granted the request for the production of the surveillance notes. When the surveillance notes were produced, and marked as Government's Exhibit 79, the Court made the statement that there is no discrepancy between the testimony of the agents and the surveillance notes of the agents (s. m. 3686).

The fact, however, is that the five F. B. I. agents testified that while Gubitchev and appellant were walking from the restaurant to the subway on January 14, 1949, the appellant gesticulated with her newspaper. The surveillance notes signed by five F. B. I. agents specifically described appellant on that occasion as gesticulating "vehemently and on several occasions striking at him with her hand and folded newspaper" (Gov. Exhibit 79).

The statement of the Court was highly prejudicial to the appellant. The notes of the agents corresponded with the testimony given by the appellant and the testimony of the agents was to the effect that the appellant and Gubitchev were merely having an animated conversation. The fact that the notes show that the appellant struck at Gubitchev with her hand and newspaper shows that the con-

versation was something which was very personal and supported the appellant's contentions. The Trial Court's statement appeared to have taken away this serious consideration of the facts from the jury. This was highly prejudicial to the appellant.

D.

After the jury started their deliberation they returned and requested all of the exhibits. During the course of the trial there were offered in evidence various reports from which excerpts were made, as referred to by the data slips. These reports contained certain red markings made by the Government.

During the course of the trial, and on June 3rd, 1949, a question arose as to whether or not the original reports from which the data slips came into existence should be marked in evidence. The Court stated that he would take the matter under advisement. Before giving the reports to the Court the Government made certain marginal bracket marks in red on the reports. These markings, according to the Government, were supposed to indicate the portion of the reports which bore a connection to the data slips. Mr. Whearty stated that he had marked these reports for the Court (s. m. 5242). When counsel for the appellant discovered these markings he called that fact to the attention of the Court and that this act of placing markings upon the records was prejudicial to the appellant (s. m. 5456). The Court thereupon stated, referring to these exhibits, that "It (referring to the Jury) would not have these papers at all" (s. m. 5458).

Mr. Whearty, after the jury came back and requested these exhibits, which included the F. B. I. reports in question containing the red marginal markings, stated that

the Government was preparing a new set of the reports without any markings (s. m. 8389). It was suggested that the jury be excused until two-thirty and in the meantime the Government would have an opportunity to get ready a set of reports without markings. Mr. Whearty joined in that request and stated that he would endeavor to get together the reports and also stated that "It will not be too difficult because we do have a duplicate set of reports already assembled as to the 22 slips we put in evidence" and also that it was "merely a matter of getting the reports for the other 12 slips" (s. m. 8391). At two-fifty-five, when the Court reconvened Mr. Kelley, who was not there in the morning, appeared and asked the Court that the reports which were actually marked in evidence (and which the Judge had said would not go to the jury, s. m. 5458) be given to the jury because they could not erase the marks as fully as possible and that the Court should send the original reports in with instructions to the jury that they should disregard the markings (s. m. 8393, 8394).

No adequate explanation was made by Mr. Kelley for the change on the part of the Government during the recess with respect to submitting a duplicate set of the reports. It is clear that Mr. Whearty, in the morning, was ready to produce copies of the reports without the markings and in the afternoon Mr. Kelley appeared upon the scene and refused to produce the reports without the markings and insisted on giving the jury the original reports with the red markings erased as best as could be. These markings, as was stated by Mr. Kelley, were alongside the statements which were included in the thirty-four data slips which were marked in evidence.

The refusal of the Government to produce copies of the reports without the markings rather than the reports which were marked in evidence with erasures resulted in the

Court making the following statement, to which exception was taken (s. m. 8401):

> "The Court: It may be they will deliberate without those. See if they make another request, and then I will see what I will do about it.
>
> "Mr. Palmer: I take exception upon the record."

The Court should have instructed the prosecution to produce before the jury copies of the reports without the red markings. This was highly prejudicial to the appellant.

Inasmuch as no further request was made for these exhibits the said exhibits were never submitted to the jury. Apparently the jurors were of the opinion that their request had been refused and therefore did not make another request. The result was that the jurors did not receive the reports which were marked in evidence and this was highly prejudicial to the appellant as it was the contention of the appellant throughout the trial that those reports do not affect the national defense.

POINT VII

The summation of the Government was highly inflammatory, replete with unfounded statements, violated the legal rights of the appellant and was highly prejudicial.

The summation of the prosecution, which begins at page 8274 of the minutes, contains many improper arguments and statements, to some of which attention must be called.

A.

Reference is made to the statement of Mr. Kelley as follows (s. m. 8274):

> "At the outset I would like to pay some tribute to the skill, the cunning, the dead earnestness of Russian espionage agents in the United States. Let there be no mistake about it, they are clever; they know what they want; they will stop at nothing to get it."

Counsel for the appellant immediately objected to this statement upon the ground that there was nothing in the record regarding the cunning of Russian espionage agents and took exception to such appeal to passion and prejudice on the part of the prosecution. This objection was overruled by the Court (s. m. 8274).

This statement is particularly prejudicial in view of the existing "cold war" between the United States and Russia and what Judge Reeves termed as a strained relationship between the two countries. This statement could only have been made by the prosecution as an appeal to the fear and passion of the jury and to lend some atmosphere to the case.

B.

The following excerpts from the record also show another instance of highly inflammatory, prejudicial and unfounded statements made by the prosecution and the objections and rulings thereon (s. m. 8275):

> "Mr. Kelley: Do not think the Russian espionage agents in this country picked Judith Coplon hastily. They took their time about it, and you may be sure they had many character sketches from many people telling all about her, about her family background—
>
> "Mr. Palmer: I take exception—
>
> "Mr. Kelley: —about her financial condition.

"Mr. Palmer: I take exception upon the record to any such statement. There is nothing in the evidence to make that statement possible.

"The Court: Objection overruled.

"Mr. Kelley: About her politics, about her attitude toward the United States Government. You may be sure they looked into her mind well. You may be sure that they penetrated that veneer of innocence and found beneath it that hard core of steel that we saw here.

"Mr. Palmer: I object to that upon the ground that it is not borne out by any evidence. This is an appeal to passion and prejudice.

"The Court: Overruled."

There is nothing in the record to support the statement by Mr. Kelley that the Russian espionage agents picked appellant, or that they took their time about it, or that they had character sketches from many people telling all about her, about her family background, about her financial condition, or her attitude toward the United States Government. Mr. Kelley did not ask the jury to draw inferences from the testimony but he made definite and unequivocal statements pretending that these statements had been established at the trial.

C.

Mr. Kelley followed these statements by the most prejudicial statement of all. This is found in the following statement, objection and decision of the Court (s. m. 8275, 8276):

"Mr. Kelley: You may be sure they were not fooled by the innocent, pretty face. They chose well. They

found in Judith Coplon a girl who hated many people and many things. Most of all, they found a girl who hated the United States Government. And no truer words were ever spoken than when Mr. Palmer said this is a case of Judith Coplon against the United States.

"Mr. Palmer: I take exception to that miserable statement on the ground it is a miserable lie.

"The Court: Objection overruled."

There is no proof that the Russian Government chose Judith Coplon. There is no proof that the appellant hated many people and many things. There is no proof that the appellant hated the United States Government.

Was it the role of the prosecution to make these inflammatory statements or was it the role of the prosecution to discuss the evidence adduced at the trial?

D.

Mr. Kelley then continued his vilification and appeal to passion with the following statement (s. m. 8276, 8277):

"Mr. Kelley: They found precisely what they wanted. They found a girl instilled with hate for the United States, willing to sell out her country. They found a girl with courage of a type, a girl who would not be frightened in the dark alleys, frightened in the meeting places, quick-witted, alert; they found a clever spy. Judith Coplon against the United States, he said. That is just it in a nutshell."

Again it is stated that there is no proof that the appellant hated the United States.

E.

Mr. Kelley, in his summation, stated that Gubitchev was indicted and is under $100,000.00 bond. This was objected to and the objection was overruled (s. m. 8292). Again there is a statement by the prosecution which is highly prejudicial to the appellant and unsupported by any testimony and entirely outside the record.

The leading case on the duties of a prosecuting attorney in the Federal Courts is discussed at length in the case of *Berger* v. *United States,* 295 U. S. 78, 55 Sup. Ct. 629, wherein the Court reversed the judgment of conviction. The Court, in discussing the summation of the Prosecuting Attorney, stated, at page 633, as follows:

> "'Mrs. Goldie Goldstein takes the stand. She says she knows Jones, *and you can bet your bottom dollar she knew Berger.* She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.' You know the rules of law. Well, it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him,* she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules.'
>
> "The jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney."

In the case at bar the various statements made by Mr. Kelley in his summation was an invitation to the

jury to conclude that the prosecuting attorney had personal knowledge of those facts. The Supreme Court, in discussing the duties of a prosecuting attorney stated, at page 633 of *Berger* v. *United States, supra,* as follows:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

As was said in the case of *Berger* v. *United States, supra,* it is not a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, which might be disregarded, but where, as in the case at bar, the misconduct of the prosecuting attorney, in his examination

with regard to the Canadian report, the Shapiro incident, and the statements made in his summation, was so pronounced and persistent that it carried such cumulative effect upon the jury that it could not be disregarded as inconsequential and must be found to be prejudicial to the appellant. See also *Viereck* v. *United States,* 318 U. S. 236, 63 Sup. Ct. 561, 566, 567.

CONCLUSION

The judgment of conviction on both counts of the indictment should be reversed and the indictment dismissed.

Respectfully submitted,

MAX L. ROSENSTEIN
and
ARCHIBALD PALMER,
Counsel to Appellant.

No. 10339

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDITH COPLON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 27 1949

Joseph W. Stewart
CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10339

JUDITH COPLON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEE

COUNTER STATEMENT

On March 16, 1949, appellant was indicted in the United States District Court for the District of Columbia for espionage and unlawful removal and concealment of Government documents, in violation of 18 U. S. C. Secs. 793 and 2071. The indictment, in two counts, is summarized, and the facts relating to verdict, sentence, and notice of appeal, are set forth in appellant's brief, pp. 1–2.

Prior to her arrest on March 4, 1949, appellant was an employee of the Department of Justice. She entered on duty in New York City on June 15, 1943 (Tr. 194),[1] and transferred

[1] The typewritten transcript of the trial proceedings is contained in 47 volumes paged in numerical order, 1 to 8503, beginning with the session of April 27, 1949. References to it will be designated "Tr." with appropriate pagination.

There are also three additional volumes. Two contain the proceedings on voir dire of April 25, 1949, and the impaneling of the jury on April 26, 1949. They are paged consecutively 1 to 274. A third volume consists of proceedings during the morning session of April 28, 1949 (pp. 1–16), and the opening statements of counsel paged 1–37 and 1–26. When referring to these three volumes, we will give the date thereof and the particular page.

to Washington, D. C., on January 16, 1945, as a political analyst in the Foreign Agents Registration Section (hereinafter referred to as FARS) which, during the pertinent period, has been part of the Criminal Division of the Department (Tr. 194–195). From January 1, 1949, until her arrest appellant occupied Room 2220 in the main Department of Justice building (Tr. 195, 233).

According to the testimony, the function of the FARS is to administer the Foreign Agents Registration Act, to secure the registration thereunder of persons subject to its provisions, to examine registration statements filed with the FARS for accuracy and compliance with statutory requirements, and to review propaganda filed in accordance with the Act (Tr. 219, 228–229). At the time of her arrest appellant was the only political analyst employed in the section, the other personnel being attorneys and stenographers (Tr. 213–216). The FARS received reports from the Federal Bureau of Investigation in connection with matters involving the Foreign Agents Registration Act and these reports were reviewed by its personnel (Tr. 230–231), but it did not receive FBI reports dealing with internal security matters in general since that was the province of a separate part of the Criminal Division, the Internal Security Section. There was one exception, however; occasionally FBI reports would deal with matters involving both a Foreign Agents aspect and an Internal Security aspect (Tr. 231).

Due to a shortage of personnel in the Internal Security Section appellant was assigned in October 1948 to help the Internal Security Section in its task of screening FBI reports designated "Internal Security-R" or "Security Matter-C," i. e., reports relating to the activities of Russian agents or Communists in the United States. This screening consisted of reading the reports rapidly to determine whether there was any indication of a federal violation, and then forwarding them to her superior or filing them, depending on whether a violation was indicated (Tr. 261–264). However, about the end of January or the first of February 1949, the Chief of the FARS, William E. Foley, who was also the Chief of the Internal Security Section (Tr. 213), directed her to stop screening reports for the Internal

Security Section (Tr. 264). He was instructed to do this by his superiors (Tr. 6404–6405). He called a staff meeting at which time he directed appellant no longer to review internal security reports of the type she had been screening in the past (Tr. 265–266). Foley told the staff meeting that this action was being taken because the FARS was now short of personnel whereas the Internal Security Section was obtaining a new attorney, Mrs. Ruth Rosson, who would be designated to review and screen these reports (Tr. 265–267).

Appellant objected to giving up the screening work. She told Foley that she was very disturbed over the change, and that occasionally information of interest to the FARS would be found in one of these internal security reports. Foley replied that Mrs. Rosson would send to the FARS any reports having a Foreign Agents interest (Tr. 266–270). Mrs. Rosson confirmed the fact that she was transferred to the Internal Security Section in February 1949 and assigned to screening certain confidential FBI reports, designated largely "Internal Security-R" and "Security Matter-C" (Tr. 409–410). Shortly thereafter appellant came to her office, said she wanted to look through the FBI reports in Mrs. Rosson's possession, and took some of them away with her (Tr. 414–415). A few days later appellant again came to Mrs. Rosson's office and asked the latter to send her "any reports relating to foreign embassies, legations or consulates, and especially the reports that were marked 'Internal Security-R' " (Tr. 417–418). Mrs. Rosson sent about fifty or sixty such reports to appellant (Tr. 418).

Foley further testified that the public files of the FARS were located in Room 2218 of the Justice Department Building, but that the propaganda and other files of the FARS were located in Rooms 2216 and 2222 (Tr. 237). In addition, a third type of file, containing "data slips," was maintained in Room 2220 (appellant's office), although a few such slips were also kept in Rooms 2216 and 2222 (Tr. 238). It was the practice of political analysts employed by the FARS to make data slips containing information which they believed would be of interest from a Foreign Agents standpoint (Tr. 251, 259), and these data slips were used in the preparation of memoranda and reports for the legal personnel of the FARS (Tr. 258–259).

Foley also identified Government Exhibit 13 (Tr. 275–276, 5058–5060), which was subsequently received in evidence during the testimony of Federal Bureau of Investigation Agent Robert J. Lamphere (Tr. 5054). This document, prepared by Lamphere on instructions from his superior (Tr. 5045), was given to Foley in the office of Peyton Ford, The Assistant to the Attorney General, on March 3, 1949. Foley was instructed to give it immediate attention (Tr. 276–277, 6389). He had no knowledge that this memorandum was to be used to ascertain what appellant would do with the information therein contained, although he may have had a personal suspicion (Tr. 6395, 6397).

Foley took the document to his office, locked it up overnight and about nine o'clock the next morning, March 4, handed it to appellant with two other memoranda Peyton Ford had given him at the same time as Exhibit 13 (Tr. 279). He told her that the one which became Exhibit 13 was "quite hot and interesting" (Tr. 279–281).[2]

Foley also testified that between January 1 and March 4 he received only one FBI report classified top secret (Tr. 287), and that he talked to appellant about it at least three times (Tr. 288). The first conversation was held in appellant's office in early January. She was discussing reports concerning certain Russian agents in the United States; Foley mentioned that he had received an additional report on that subject; appellant asked if and when she could see it; and Foley replied that it was top secret (Tr. 288–289). A week later, again in her office, appellant asked Foley when she was going to see the top secret report. He told her he did not know when she could see it (Tr. 289–290). The third conversation took place a month later in Foley's office. Appellant repeated her question as to when she could see the top secret report and

[2] Exhibit 13 is a memorandum from the Director of the Federal Bureau of Investigation to The Assistant to the Attorney General, headed "Amtorg Trading Corporation, Internal Security-R." In pertinent part, it states that the Bureau was using two highly placed Amtorg officials as confidential informants, and that Amtorg had been in touch with a certain company regarding geophones, indicating that Amtorg had the highly restricted information that such instruments were being used to make blast measurements at Alamogordo and other testing points.

Foley replied that he did not know because another official of the Department had it (Tr. 290–291).

In addition to the foregoing, the Government's evidence showed in detail the surveillance by FBI agents of three meetings of defendant in New York City with one Valentin A. Gubitchev, a Russian national employed as a civil engineer by the United Nations Secretariat. These meetings occurred on January 14, February 18, and March 4, 1949, the arrest being made on the latter date.

January 14, 1949

On Friday, January 14, 1949, at approximately 4:45 P. M., appellant, en route from Washington, D. C., arrived at Pennsylvania Station, New York City. After remaining about 45 minutes in the ladies' room she checked her bag, spent 10 to 15 minutes in a book store, ate in a drug store and then boarded a northbound IRT (7th Avenue) subway train, getting off at the 191st Street station (Tr. 440–442).

Although a pedestrian tunnel led from the lower level of the 191st Street station direct to Broadway (Tr. 486–487) appellant ascended by elevator to ground level, emerging from the station on St. Nicholas Avenue. She walked north on St. Nicholas Avenue to Wadsworth Avenue, turned left, circled the block and walked south on St. Nicholas Avenue past the point from which she had earlier left the subway station and by a circuitous and descending route, ultimately reached the intersection of Fairview Avenue and Broadway (Tr. 445–449). While the devious route from the subway station to Broadway followed by appellant extended for many blocks through dimly lighted streets (Tr. 485), the point at which appellant ultimately reached Broadway is located in the immediate vicinity of the exit from the tunnel leading directly to Broadway from the subway station (Tr. 478, 488).

Having arrived at Broadway, appellant turned to the right (or north) and walked one long block to the northeast corner of Broadway and 193rd Street, stopping in front of a cigar and candy store (Tr. 451). After waiting at this point for about seven minutes (Tr. 565), and at approximately 7:10 P. M.

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(Tr. 820), appellant was joined by a man whose identity was then unknown to the agents engaged in the surveillance, but who was subsequently ascertained to be Valentin A. Gubitchev (Tr. 454, 492).

Appellant and Gubitchev then walked together, north along Broadway, northwest along Nagle Avenue to Dyckman Street and thence westerly on Dyckman Street to the De Luxe Restaurant where they entered and occupied a booth (Tr. 454–457). After approximately 45 minutes they left the restaurant, walked westerly on Dyckman Street to Sherman Avenue, southerly along Sherman Avenue to Broadway and then south on Broadway to Bennett Avenue where they entered a tunnel leading to the 190th Street (Fort Tryon Park) station of the 8th Avenue (Independent) subway (Tr. 458–461). During the walk from the restaurant to the subway station appellant and Gubitchev stopped on occasion and appellant was observed to gesticulate toward Gubitchev with a newspaper (Tr. 495).

Appellant and Gubitchev walked through the tunnel into the subway station, boarded a downtown express train, and, seated together, rode south as far as 125th Street. When the train stopped at this station some people left the car, the doors remaining open. Appellant and Gubitchev remained seated. Just before the car doors closed Gubitchev arose, hurriedly left the train, crossed the platform and boarded a downtown local train (Tr. 499). The surveillance continued from this point as to Gubitchev, while surveillance of appellant, who remained on the southbound express train, was discontinued (Tr. 500).

After boarding the local train at 125th Street, Gubitchev rode to the next stop, left the subway and ascended to the street level at 8th Avenue and 116th Street. He entered a taxicab and drove to the corner of Broadway and 116th Street, where he alighted from the cab and entered the 116th Street IRT (7th Avenue) subway station (Tr. 502–503). By the time agents conducting the surveillance were able to reach the track level of the subway station a train was pulling out and Gubitchev no longer could be observed (Tr. 802). At one point the route followed by the taxi lay within two blocks of Gubitchev's residence located at 64 West 108th Street (Tr. 504). Shortly after

10:00 o'clock on the following morning, January 15, 1949, Gubitchev was observed to enter the headquarters of the Soviet Delegation to the United Nations. About a half hour later he emerged therefrom and proceeded to his residence (Tr. 505–506).

February 18, 1949

Appellant again went to New York City on the afternoon of Friday, February 18, 1949. She arrived at Pennsylvania Station at approximately 6:35 P. M., the train being about 35 minutes late (Tr. 894, 945, 1032, 1210). She was wearing black, high heel ankle strap shoes, one of the straps being broken (Tr. 947, 1211). This caused her to limp (Tr. 1032). After leaving the train she moved rapidly from track level up the stairs to the lower station level, deposited her overnight bag in a locker, hurried to the entrance of the Independent (8th Avenue) subway, and boarded the last car of a northbound express train (Tr. 895, 947, 1033, 1211). The train was very crowded and one of the surveilling agents stood immediately behind appellant (Tr. 1037–1038). He saw her open her purse and, as she put her hand therein, he observed therein a folded piece of onionskin paper. The agent saw typing on the side folded inward (Tr. 1038–1039).

Appellant left the subway at the 190th Street stop (Tr. 895, 947, 1041, 1212), stopped on the platform for a minute or two, thus allowing the other passengers who had alighted to ascend the elevator to the street, then took the next elevator to ground level in Fort Tryon Park (Tr. 897, 948), although a tunnel exit ran directly to Bennett Avenue, near Broadway (Tr. 904). On emerging from the elevator she moved out on the esplanade and into the Park. She followed a path for a short distance, finally meeting two of the surveilling FBI agents (Tr. 902, 949). She asked directions to Broadway, the agents replied that they were also lost, appellant exclaimed "Oh God," and all three went back down the elevator to the subway station to ask directions (Tr. 902–903, 949, 951). They walked through the tunnel to Bennett Avenue and the agents observed appellant walk down Bennett Avenue to 192nd Street, where she turned east toward Broadway (Tr. 904–906, 949–950).

At this time, about 7:15 or 7:20 P. M., other agents observed appellant walking east on Bennett Avenue, toward Broadway (Tr. 1045, 1213). She crossed Broadway to the east side and walked north to the 193rd Street intersection. There she waited three or four minutes in front of the same cigar and candy store where she had met Gubitchev on January 14 (Tr. 454, 492, 1046, 1213). She then walked north several paces, turned and walked south a short distance, stopped, looked around and then started north again. At a point just below the intersection she again turned around and entered a shoe repair store near the corner (Tr. 1046–1047, 1213–1214). Appellant remained in the store about ten minutes (Tr. 1056, 1214). On emerging she stopped momentarily and looked south, then turned north and walked to the corner of 193rd and Broadway. Just before reaching the corner she stopped, turned around facing south, then continued north to the intersection where she turned east along 193rd Street (Tr. 1056–1057, 1214).

It was then shortly after 7: 30 P. M. (Tr. 1057–1059). At about two minutes before 8:00 P. M. surveilling agents again saw appellant walking north on the west side of Broadway, about 15 or 20 feet south of the 192nd Street intersection (Tr. 1058–1059, 1215). At virtually the same time they observed Gubitchev on the east side of Broadway, opposite appellant and also walking north (Tr. 1060–1061, 1215). Appellant started crossing Broadway in a diagonal direction, from the west to the east side of the street, while Gubitchev continued to walk north on the east side (Tr. 1061, 1215). As appellant reached the curb, she had her purse under her left arm against her chest. The agents could see that it was open, they saw her put her hand in it, and they saw Gubitchev, who was a couple of paces behind, hurry his pace and step up alongside her (Tr. 1061–1062, 1215–1216). Gubitchev reached across in front of appellant with his right arm, they took five or six steps side by side, then Gubitchev stopped and appellant continued walking north (Tr. 1062, 1216). This meeting occupied only a few seconds (Tr. 1216). The surveillance was then discontinued but appellant returned about 9:00 P. M. to Pennsylvania Station where she retrieved her overnight bag and took a Brooklyn-bound subway (Tr. 2905–2906).

March 4, 1949

The third contact between appellant and Gubitchev in New York occurred on Friday, March 4, 1949. Appellant arrived in Pennsylvania Station about 5:30 P. M. (Tr. 1583, 1609, 2314). She proceeded through the station, checked her red vanity case and walked north on 7th Avenue to 37th Street (Tr. 1584–1586, 1610, 1613). There she turned around and entered a restaurant located on 7th Avenue above 36th Street, remaining therein for about 10 minutes (Tr. 1586–1587, 1613). Upon emerging she went to 42nd Street and 8th Avenue, entered the Independent (8th Avenue) subway station, and after first proceeding toward the downtown turnstiles reversed her direction and boarded an uptown express train at about 6:10 P. M. (Tr. 1587–1590, 1613). In the meantime Gubitchev had been observed near the corner of 1st Avenue and 42nd Street shortly before 5:00 o'clock, but surveillance was soon discontinued at 42nd Street and Lexington Avenue (Tr. 3435–3438).

Appellant left the subway at the 181st Street station (Tr. 1614, 2316). She walked south with the crowd of alighting passengers toward the 181st Street exit, glancing back and looking behind her, but before reaching the exit she turned and, still looking back, walked north alone toward the 184th Street exit (Tr. 1614–1615, 2316–2317). This action caused the agents to discontinue the surveillance, but other agents observed appellant about 6:45 P. M. walking north on the west side of Broadway near 187th Street, saw her stop in a luncheonette between 190th and 192nd Street, and then cross Broadway at 192nd Street and proceed north up the east side (Tr. 2906, 3124, 3290–3293). At the Broadway and 193rd Street intersection she stood in front of the Terrace Drug Store for about 6 minutes, glancing up and down the street, and then walked south on Broadway (Tr. 2906–2907, 3125, 3294). Upon reaching Fairview Avenue, almost opposite 190th Street, at about 7:10 P. M., she reversed and walked north a short distance, then south again, and then north (Tr. 2618–2619) to 193rd Street where she hesitated, looked back over her shoulder, and entered a cigar and candy store on the northeast corner at 7:18 P. M., remaining for about 10 minutes (Tr. 2907–2908, 3127–3128).

Meanwhile, one of the agents had entered the IRT (7th Avenue) subway entrance located at Broadway and 190th Street. While walking through the tunnel leading to the tracks the agent passed Gubitchev, who was proceeding in the opposite direction (Tr. 2320–2321). Shortly thereafter, at 7: 23 P. M., other agents observed Gubitchev in the vicinity of 192nd Street walking north on the east side of Broadway. He went into the Terrace Drug Store, on the southeast corner of the 193rd Street intersection, for about one minute. At this time appellant was in the cigar and candy store on the northeast corner of the same intersection (Tr. 2908–2909, 3128–3130). On leaving the store Gubitchev glanced up and down Broadway, then crossed the street and stood for some time in a bus stop on the northwest corner of Broadway and 192nd Street, letting several buses pass (Tr. 2909–2911, 3130–3133). Finally about 7:45 P. M. the surveilling agents saw a bus stop and when it started Gubitchev was no longer visible; obviously he boarded it because he was seen to alight from a south-bound bus at 187th Street and Broadway soon after (Tr. 1621, 2621, 2623) and walk south on the west side of Broadway (Tr. 1623, 2327–2328, 2623).

Appellant left the cigar and candy store at 7: 28 P. M. and started south on the east side of Broadway (Tr. 2909–2910, 3128, 3131). She continued to 181st Street, went into a Bickford's restaurant for 5 minutes, and then walked north on the west side of Broadway (Tr. 2459–2460, 2464, 3299). As she approached 185th Street, surveilling agents saw her look back over her shoulder. Simultaneously they saw Gubitchev walking south toward appellant and also on the west side of Broadway (Tr. 1624, 2334, 3299). As they passed each other Gubitchev stopped and turned toward appellant. She, however, continued walking but looked back over her shoulder after passing him, and Gubitchev stood watching her (Tr. 1624, 2335–2337, 2464–2465). He then followed her north on Broadway, overtaking her just above the intersection of 189th Street (Tr. 1626, 2465–2466, 4422–4423). They took five or six steps side by side, then Gubitchev increased his pace and drew ahead, both separately proceeding north (Tr. 1626–1627, 2466–2467).

Appellant continued to 190th Street, walked west one dimly-lighted block, retraced her steps to Broadway and entered the IRT entrance at Broadway and 190th Street at 8:00 P. M. (Tr. 1627, 2468–2470, 3300–3301, 4422). Only one surveilling agent followed her (Tr. 3300). She took a downtown train to the Times Square stop (Tr. 3301–3304), reached a spot on the corner of 7th Avenue and 42nd Street, where she stood for a moment at 8:35 P. M. (Tr. 3305–3306, 3308), then walked almost to 43rd Street but came back and stood in the same spot for nearly ten minutes (Tr. 3308–3309) before proceeding west on the north side of 42nd Street (Tr. 3309–3310). In the middle of the block between 7th and 8th Avenues Gubitchev appeared and followed appellant at a distance of 25 or 50 feet. Before crossing 8th Avenue, however, he stopped, turned around and then again followed appellant (Tr. 3312). Near the Holland Hotel, on the north side of 42nd Street near 9th Avenue, Gubitchev began to run (Tr. 3313). He overtook appellant, passed her, and she also began to run (Tr. 3318–3319). Both crossed 9th Avenue and boarded a waiting southbound bus, Gubitchev first and appellant next (Tr. 3319). This action prevented the surveilling agent from boarding the bus, but he took its number and notified the New York Federal Bureau of Investigation office (Tr. 3320).

Other agents in a Bureau car overtook the bus about 9:00 P. M. at 22nd Street and 9th Avenue (Tr. 3438–3439). Gubitchev was seated alone in the rear; appellant was seated forward alone on the opposite side of the vehicle (Tr. 3439–3440). Just before the bus reached 14th Street Gubitchev moved toward the rear exit, appellant followed him and both alighted at the northwest corner of 14th Street and 9th Avenue, where they stood for several minutes looking about in various directions (Tr. 3440–3441, 3748–3749). The neighborhood was almost deserted. They crossed to the southwest corner, stood for several moments looking about, and then went to the southeast corner where they again stopped and looked about in all directions (Tr. 3441–3442, 3749) before proceeding east on the south side of 14th Street. After a few paces Gubitchev "turned and looked around behind him again, scanning the area" (Tr. 3749); later both hesitated and looked behind them (Tr. 3442–3443).

At 14th Street and 8th Avenue appellant and Gubitchev entered the BMT subway station, boarded a waiting eastbound train and occupied separate seats, adjacent but at right angles to each other (Tr. 3751–3754). Only one surveilling agent was able to follow them. At the 3rd Avenue stop both got up and left the train just as the doors were closing (Tr. 3755). It was then 9:20 P. M., and these tactics prevented the agent from leaving the train. He last saw them on the subway platform (Tr. 3755–3756). They were located again, however, walking north on the east side of 3rd Avenue between 15th and 16th Streets, and Robert R. Granville, Supervisor of the New York FBI office (Tr. 3898) placed both under arrest at 9:35 P. M. (Tr. 3900–3901, 4159–4160). During the entire surveillance of March 4, the agents kept in touch with each other by means of radio communications (Tr. 2562, 2576–2577, 3988, 4017–4018, 4041–4043, 4092–4097, 4099–4101, 4115–4116, 4182, 4224).

The agents took appellant to the FBI office in a Bureau car, one of them taking possession of her purse (Tr. 4161–4162). On arrival at the office Special Agent T. Scott Miller opened it and examined and removed the contents (Tr. 4426–4427, 4438). A number of the items which he took therefrom were introduced in evidence (Tr. 4435–4440, 4478, 5022). They were Government Exhibits 90 (a)–111 (a) inclusive, Government Exhibits 112–117 inclusive and Defendant's Exhibits 104–115 inclusive.[3]

Government Exhibits 90 (a) through 111 (a) were twenty-two of the thirty-four data slips found in appellant's purse. Defendant's Exhibits 104 through 115 were the remaining twelve. It developed that the latter were eventually introduced as defense exhibits because the Government did not intend to use them, but was required to turn them over to appellant by the trial judge (Tr. 5008–5011).[4] Special Agent

[3] Certified copies of these Exhibits, as well as Government Exhibit 13, were transmitted to this Court pursuant to the Government's counter designation of record and an order of the court below.

[4] The thirty-four data slips, together with Government Exhibit 115, were folded inside of two blank envelopes, Exhibits 113 and 114, telescoped into each other. The latter were sealed with Scotch tape and were slipped into Exhibit 112, a folded printed advertising circular of a pair of Belle-Sharmeer stockings, also sealed at the ends with Scotch tape (Tr. 4480–4486). The

Lamphere testified that he examined the files of the Department of Justice dealing with the subject matter of the data slips and found that in each instance the information set forth on the particular data slip was contained in an FBI report in the corresponding file (Tr. 4949–4951).[5] In addition, it was stipulated that Government Exhibits 90 (a)–100 (a) and 111 (a) and Defendant's Exhibits 104–106 were prepared on a typewriter located in Room 2220, Department of Justice Building; that Government Exhibits 104 (a)–110 (a) and Defendant's Exhibits 114–115 were prepared on a typewriter located in Room 2216 of the Justice Department Building and were direct carbon copies of originals found by the FBI in appellant's office; that Government Exhibits 101 (a)–103 (a) and 115 and Defendant's Exhibits 107–113 were prepared on defendant's portable typewriter found in her residence; and that Government Exhibit 117 is entirely in appellant's handwriting (Tr. 6211–6212).

Government Exhibit 115 consisted of four pages typed on appellant's portable typewriter. It was dated March 3, 1949. In substance, it referred to her unsuccessful attempts to get from Foley "the top secret FBI report which I described to Michael on Soviet & Communist Intelligence Activities in the U. S.", described appellant's educational background and gave biographical sketches of three individuals. Government Exhibit 117, in defendant's handwriting, summarized the FBI memorandum dated March 3, 1949, which was Government Exhibit 13.

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folded circular was the same size as, and completely covered the telescoped envelopes. Government Exhibit 117 was a 5 x 8 sheet of plain white paper containing handwritten matter and was wrapped in a similar piece of blank paper, Exhibit 116, which was folded to a size of approximately 1 x 1½ inches and sealed with Scotch tape. An arrow drawn in ink pointed to the tape (Tr. 4486–4487).

[5] The FBI reports corresponding to each of the data slips, both the 22 which were Government exhibits and the 12 which were defense exhibits, were introduced in evidence by appellant as Defendant's Exhibits 104A–107A, 108A–1 and 108A–2, 109A–112A, 113A–1 through 113A–6, 114A–115A, 116–122, 123–1 and 123–2, and 124–128 after the trial judge compelled the Government to make them available to her (Tr. 5218–5222). However, neither side designated them for inclusion in the record on appeal in this Court.

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STATUTES

The statutes involved are set forth in the Appendix to this brief, *infra*, pp. 62–65.

SUMMARY OF ARGUMENT

I

In urging that the grand jury was illegally constituted because some of its members were Government employees, appellant makes no distinction between the grand jury and the petit jury. It is elementary that the functions of the two are basically different, but even if there had been bias on the part of Government employees on the grand jury—which is by no means conceded—this would not have constituted grounds for setting aside the indictment. In any event, this Court has held that an indictment is not invalidated by the preponderance of Government employees on the grand jury. *Romney* v. *United States*, 83 App. D. C. 150, 167 F. 2d 521, cert. den. 334 U. S. 847.

II

A. Appellant waived any right to complain of the presence of Government employees on the petit jury. The Government suggested, out of an abundance of caution and in view of the peculiar circumstances of this case, to stipulate that all Government employees on the jury panel should be deemed excused for cause. The trial judge agreed to direct the clerk to call only non-Government employees, but appellant rejected this offer. She cannot refuse to take advantage of a means or opportunity for excluding allegedly objectionable jurors without waiving the objection to them.

B. In any event, the petit jury was not illegally constituted. The record is devoid of any showing of actual bias on the part of any prospective juror; in fact it proves the contrary. There is no implied bias on the part of Government employees. They are made eligible to serve as jurors by D. C. Code (1940) Sec. 11–1420; both the Supreme Court and this Court have upheld the propriety of such service in the District of Columbia.

III

A. Appellant's arrest was valid because the arresting officer had reasonable grounds to believe that she was guilty of a felony and there was a likelihood of her escaping before a warrant of arrest could be obtained. The facts in the possession of the arresting FBI agent were known to him in his official capacity; the arrest was not invalid because based on hearsay. In view of the activities of appellant and Gubitchev as observed by the FBI, there was clearly a likelihood of appellant's escaping before a warrant could be obtained.

B. The arrest being valid, so was the search and seizure, incidental thereto, of appellant's purse and its contents. There is a clear distinction between a search of the person of one who has been lawfully apprehended without an arrest warrant, and the search of premises without a search warrant.

IV

Appellant was charged in Count I with copying, etc., information respecting the national defense for the purpose, and with the intent and belief, proscribed by the second paragraph of 18 U. S. C. Sec. 793. Clearly there is no merit to the contention that a Government employee cannot violate that paragraph merely because he had lawful access to the material which he copied. The data slips on their face plainly related to the national defense, the trial judge did not state the contrary, and they were in fact deposited with the Department of Justice within the meaning of 18 U. S. C. Sec. 2071.

V

The use of Government Exhibit 166 for identification for purposes of cross-examination, after appellant admitted having read portions of it and after she read additional portions aloud in the presence of the jury at the direction of her counsel, was not rendered improper by the failure of the trial court to admit the exhibit in evidence. Similarly, there was no error in permitting cross-examination of appellant respecting her relations with another individual during the period of her alleged

romance with Gubitchev, since she based her defense upon such romance.

VI

The evidence amply warranted the finding of guilt. Appellant's activities prior to the arrest, and the nature of the documents seized from her possession, refute any possible hypothesis of innocence. The well-known rules that an inference cannot be based upon another inference, and that an acquittal should be directed unless the evidence excludes every hypothesis except that of guilt, are inapplicable.

VII

The prosecutor's closing argument was predicated upon inferences proper from the testimony and the Government's theory of the case. There is no analogy between this case and *Berger* v. *United States,* 295 U. S. 78. Moreover, the trial judge instructed the jury that they were not to consider remarks of counsel as evidence.

VIII

There was no error in the charge to the jury. Many of appellant's requested instructions which were denied were covered in the general charge. Others were erroneous or inapplicable to the case. The trial judge did not take from the jury, contrary to *Gorin* v. *United States,* 312 U. S. 19, the issue whether the documents related to the national defense. On their face, the data slips herein involved did so relate beyond any doubt. Additionally, the trial judge several times in his charge made it clear to the jury that they were to determine whether the information on the data slips related to the national defense.

ARGUMENT

I

The grand jury which returned the indictment was not illegally constituted

Appellant contends (Point I, Br. 24–45) that the grand jury which returned the indictment in the instant case was illegally constituted because a majority of its members were

Government employees. The nature and circumstances of the crime with which appellant is charged are such, she urges, that "bias must be imputed to Government employees selected as jurors or grand jurors." (Br. 39.)

Appellant throughout her discussion of the composition of the jury makes no clear distinction between the grand jury and the petit jury. Indeed, she contends that the same argument is equally applicable to each (Br. 45).[6] It is elementary that the functions of the grand jury are basically different from those of the petit jury. As stated in *United States* v. *Belvin,* 46 Fed. 381, 384 (E. D. Va.):

> The function of the grand jury is not to try persons accused of crimes, but merely to examine whether and what crimes have been committed, to designate the persons at whom the evidence points as criminal, and, by indictment to charge such persons before the court and country as answerable for the crimes which have been committed. * * * Grand Jurors are not sworn on their *voir dire* to say whether they have formed or expressed an opinion of the guilt or innocence of a person charged with crime. On the contrary, the court charges each of them to bring to the attention of the grand jury all offenses of which he may have a personal knowledge. The grand jury does not try; it merely accuses with a view to trial. The petit jury tries; no other body does or can try the graver offenses.

See, also, *Nanfito* v. *United States,* 20 F. 2d 376, 378 (C. A. 8); *United States* v. *Atlantic Commission Co.,* 45 F. Supp. 187, 192 (E. D. N. C.).

Even if there had been bias on the part of Government employees on the grand jury—which is by no means conceded—this would not have constituted grounds for setting aside the indictment. As stated in *Jackson* v. *United States,* 102 Fed. 473, 478 (C. A. 9):

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[6] A further illustration of appellant's failure to differentiate between the grand jury and the petit jury occurred in the argument by appellant's counsel on the motion to quash the indictment when he stated (Tr. 107): "Why couldn't he present it (the case) before a grand jury of her peers, so far as that is concerned, and give her the right which is hers?"

> And it has frequently been held, in the absence of any statute to the contrary, that an interest or bias in the case, not of a pecuniary nature, cannot be urged as an objection [to the composition of the grand jury].

See, also, 88 A. L. R. 899, and cases there cited.

Quite apart from the foregoing, it must be noted that appellant, to support her contention that Government employees on the grand jury were not impartial, has relied only upon unproved assumptions and has not attempted to demonstrate any actual partiality because of the composition of the grand jury. It is now well settled by *United States* v. *Wood,* 299 U. S. 123, 149, which upheld the constitutionality of the statute governing the selection of jurors in the District of Columbia,[7] that:

> The imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.

That an indictment is not invalidated by the preponderance of Government employees on the grand jury was specifically decided by this Court in *Romney* v. *United States,* 83 App. D. C. 150, 167 F. 2d 521, cert. den. 334 U. S. 847. To like effect is *United States* v. *Fields,* 6 F. R. D. 203, 205 (Dist. Col.), where the defendant's motion to dismiss the indictment, on the ground that the grand jury that found the indictment was not truly representative of the community because fourteen of its members were Government employees, was dismissed. See also *May* v. *United States,* — App. D. C. —, 175 F. 2d 994, 1001, cert. den. October 10, 1949, No. 100, October Term, 1949.

Had there been any systematic, purposeful or intentional exclusion of any qualified class of citizens from the grand jury in the instant case, such as was involved in *Thiel* v. *Southern P. Co.,* 328 U. S. 217 (petit jury), and *Ballard* v. *United States,* 329 U. S. 187 (grand and petit juries), a showing of actual partiality, of course, would not be necessary. But appellant

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[7] Act of August 22, 1935, c. 605, 49 Stat. 682, D. C. Code (1940), Sec. 11–1420. No conflict exists, contrary to appellant's assertion (Br. 26), between this Act and 28 U. S. C. Section 1862.

makes no contention that such discrimination existed in the selection of the grand jury. She attempts, on the contrary, to reason that the "converse" of the *Ballard* rule regarding discriminatory *exclusion* constitutes a fatal defect in the selection of a jury (Br. 30); in other words, that the *inclusion* of a certain class (Government employees) is of itself violative of the Sixth Amendment. The decisions, however, support no such conclusion, as is further noted in Point II, *infra*, pp. 23–27.

II

Appellant waived any right to complain of Government employees on the petit jury, but, in any event, the jury was legally constituted

Nowhere in appellant's brief (Point I, Br. 45–48) does she mention the significant fact that the Government offered to agree to exclude all Federal and District of Columbia employees from service on the petit jury, and that appellant rejected this offer. Hence, we shall first contend that the appellant has plainly waived any right she might have had to complain of the inclusion of Government employees in the petit jury which tried and convicted. And, while we think it clear that she is thus precluded from now challenging the legality of the petit jury, nevertheless, we shall show that the petit jury was not illegally constituted because it included Government employees.

A. Appellant has waived any right to complain that Government employees served on the petit jury

Even if it be assumed, for purposes of argument only, that Government employees should as a matter of law have been excluded from the petit jury panel, appellant waived any right she may have had to object to their inclusion. Her brief is strangely silent as to the fact that the Government offered to agree to exclude all Government and District of Columbia employees from service on the petit jury, and that appellant rejected this offer. The following occurred (Tr. April 25, 1949, pp. 114–117):

Mr. KELLEY. * * * With respect to the petit jury to be drawn in this case, without yielding on principle under those authorities we cited this morning, which would govern both as to grand jury and petit jury, the government, out of an abundance of caution, is prepared in this case to stipulate that any juror called to the box (who) may be an employee of the Federal Government or the District of Columbia may be deemed to be challenged for cause properly.

I would like to say at this time for the record, however, that in offering to so stipulate in this case the Government is mindful of the facts peculiar to this case, that the Defendant, a Government employee, is charged with espionage and disloyalty, and so the record may be fully clear in so offering to stipulate, the Government does not suggest that that stipulation may be used henceforth in cases not involving the facts peculiar to this case. In other words, no precedent is intended to be [e]stablished in so far as Government employees are concerned save in this case where the employee herself was with the Federal Government and wherein the case involves espionage and disloyalty.

We make that tender of stipulation.

Mr. PALMER. That tender, in my estimation, has come too late.

One of the things my friend passed by in connection with the statement that he wants to stipulate now in a jury to be picked from this panel, that so far as he is concerned, he is going to establish a new precedent for this case, which the papers have been full of, and I say to Your Honor, please, in the first place he has no power to make such a stipulation because the cases have held that where people involved with the Government attempt to make a settlement, income tax where fraud is involved, that no matter what settlement a Government agent has offered to make, he cannot make a settlement of any kind if the Attorney General's office says a crime has been committed.

Secondly, he has overlooked the main point here.

My main point in the beginning was that the grand jury that indicted her was made up of less than the requisite 12 if you exclude the Government. We say we do not want to be treated any differently than anyone else. We are no better or no worse than anybody else in the country. We are entitled to our rights.

If this panel was improperly drawn for the petit jury, how can the Attorney General be allowed to go ahead and waive the requirement? If the law says that that grand jury was improperly drawn and the petit jury is improperly drawn, then they were drawn improperly and no such concession, as far as I am concerned, will be of any avail.

* * * We do not accept such a concession. We say they were illegally drawn. We say we want to challenge the entire panel that has been sent to this court room for cause. The issue is before the Court.

Following the above proffer by the Government, and its rejection by appellant, the court below discussed general principles applicable to jury selection and overruled appellant's motion to quash the indictment (Tr. April 25, 1949, pp. 118–126). It then said (Tr. April 25, 1949, p. 126):

The COURT. * * *

I listened interestingly (interestedly) to what counsel said about the proposal that was made by the Government attorneys here that if I overruled the challenge to the grand jury that in order to obviate the identical question that would be raised here, that they were willing to have the court call and qualify only persons who were not connected in any way with the Government. That is a thing that would bind the Government. That is a procedural matter.

I am merely going to suggest to counsel that if counsel is willing to accept that proposal, then I will order a jury brought in here of only persons not in any way connected with the Government.

Following a further interchange between the court and appellant's attorney concerning the selection of the jury, the

court also overruled appellant's contentions with respect to the constitution of the petit jury (Tr. April 25, 1949, p. 129).

The following then occurred (Tr. April 25, 1949, pp. 129–130):

> The COURT. * * *
>
> However, since counsel has made the suggestion, I think it is my duty, if it is desired by counsel, to direct the Clerk to bring in here for jury service in this case only persons who are not Government employees.
>
> * * * * *
>
> The COURT. As I understand, you do not accept the suggestion? You are not asking that the Clerk bring in non-government employees?
>
> Mr. PALMER. No.

The Government's proffer would have given appellant everything she requested. The allowance of her motion challenging the array could have done no more. Under the circumstances she clearly waived any right to object to inclusion of Government employees on the petit jury panel. Refusal to take advantage of a means or opportunity for excluding an objectionable juror of course effected a waiver. She cannot speculate on the chances of a favorable verdict and then set up that she did not waive her rights with respect to the composition of the jury. See *Francis* v. *Southern P. Co.*, 333 U. S. 445, 451; Cf. *Queenan* v. *Oklahoma*, 190 U. S. 548, 551; *Carruthers* v. *Reed*, 102 F. 2d 933 (C. A. 8), cert. den. 307 U. S. 643. Nor can it be successfully contended that appellant was unable to waive the constitutional right which she claims she had in this case. *Patton* v. *United States*, 281 U. S. 276; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269.

The circumstances in which appellant's counsel refused the Government's proffer compel the inference that the refusal was made for the purpose of laying the foundation for appellant's contentions with respect to the composition of the petit jury. In any event, the words of the Supreme Court in *Frazier* v. *United States*, 335 U. S. 497, 507, addressing itself to a somewhat analogous situation, are pertinent:

> * * * We are not willing to join in repudiating the consequences of [petitioner's] own selection. We

take petitioner at his word as expressed by his repeated choices. The fact that he exercised his peremptory challenges as he did, so frequently and consistently to eliminate privately employed jurors and retain only Government employees, hardly can be said to give cause for him to claim overweighting of the jury with Government employees. There was no defect of the panel in this respect. Nor is there any claim or basis for one that the prosecution utilized its peremptory challenges to bring about a jury constituted only of them. It would be going very far to say that in the circumstances shown by this record petitioner was deprived, either in law or in fact, of an impartial jury or indeed of one fairly representative of the community. If deprivation there was, even in the latter sense, it was the result of his own choice, not of imperfection in the choices tendered him by law or in the procedures of selection afforded.

B. The petit jury was not illegally constituted because Government employees served thereon

While we think it clear that, as shown in A, *supra,* the appellant is barred from complaining that Government employees served on the petit jury, we shall, nevertheless, meet the issue.

Appellant claims that the petit jury was illegally constituted because "the jury lists of the District of Columbia include, to a great extent, Government employees" (Br. 45), and asserts that prejudice, *ipso facto,* results when a jury is so constituted "where a Government employee is charged with the crime of espionage and disloyalty" (Br. 31). Here, again, the argument rests upon the assumption that Government employees solely by virtue of their employment would be biased and not impartial. But, as noted above, *United States* v. *Wood,* 299 U. S. 123, established that partiality in criminal cases is not imputed as a matter of law to Government employees solely by virtue of their employment. *Frazier* v. *United States,* 335 U. S. 497, is to the same effect.

It was incumbent upon appellant, therefore, in support of her challenge for cause, to show the existence of such special

factors as required the trial court, in the exercise of a sound discretion, to find that the Government employees would be partial in this case. The only special circumstances upon which appellant relied were the fact that a Federal employee was charged with espionage, "the circumstances and the times" (an unamplified reference), and the existence of Executive Order 9835.

Appellant refers to the fact that the Government employees had signed "loyalty pledges" (Br. 47). From this she imputes bias. The *voir dire* examination developed nothing, however, to support the assumption. In fact, the contrary is indicated. For example (Tr. April 26, 1949, pp. 165–166):

> Mr. PALMER. Have any of you folks—and I am particularly addressing myself to those jurors who announced their years of labors in the various departments of the Government—any particular feeling because of the fact that you are working for the Government, and working so long, that in trying a case of this kind wherein the question of the loyalty of Judith Coplon over here will be in issue, with various FBI agents and the balance testifying as to various things, making their interpretation of it, have any of you folks on this jury any feeling when it came to deciding the facts in this case that if they feel that this girl is not guilty there may come a day after that, I mean thereafter, wherein the fact that they found her not guilty would be held up against them in the Department, might interfere with their employment, in their happiness, and in their explanations to their fellow workers—any of you folks who are working for the Government, would you feel, under those circumstances, you would rather not be on a case where the loyalty or disloyalty of a person employed by the Government is at stake because of the fact that I spoke about might interfere with promotion, might interfere with other people's thoughts—do you feel, under those circumstances, you would rather not sit in this case?
>
> Prospective Juror BEAVER. Not because of the fact——

Mr. PALMER. You are the man that hit me between the eyes yesterday with your statement which of course, is like the book, "It can't happen here, but it does"—so, I ask you the question, what do you mean?

Prospective Juror BEAVER. Simply because I am a Government employee does not affect my outlook.

Mr. PALMER. That should not affect your outlook. But, you feel, by being a Government employee, that your outlook toward things in connection with the Government are in anywise different from the standpoint of the outlook regarding the things that happen in Government, the red ink and all that goes with it, and the supervision—do you feel differently than you would if you were working in private employment or than you would if you were in business for yourself?

Prospective Juror BEAVER. No; I do not feel different.

Mr. PALMER. And how do you feel? (All of the prospective jurors answered "No different.")

The court below, furthermore, following questions submitted by appellant's counsel, fully interrogated the jurors on the existence of any actual prejudice arising out of the nature of the case and the fact that several jurors were Government employees. In no instance was such prejudice established; in fact, the absence of any prepossession was indicated (Tr. April 26, 1949, pp. 178–179, 196, 199–200).

The vague allusions to "special circumstances" in appellant's brief and the absence of anything in the record to show bias on the part of Government employees are totally insufficient to satisfy the requirement that actual partiality must be demonstrated before prospective jurors are to be excluded.

The same issue was recently before this Court in *Dennis* v. *United States*, 84 App. D. C. —, 171 F. 2d 986, cert. granted 337 U. S. 954, where the Court quoted from the *Wood* case, *supra*, at p. 150, language equally apposite here:

> It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have

> reference to some special and exceptional case, it seems to us far-fetched and chimerical. It does not rise to the dignity of an argument to be addressed to the power of Congress to provide a reasonable scheme with respect to the qualification of jurors.[8]

Appellant seeks to distinguish the *Dennis* case from the case at bar on the ground that Dennis was not a Government employee. But since the question is one of assumed bias of Federal employee-jurors where a "loyalty issue" is allegedly involved, the distinction is untenable.

It is also urged by appellant that the "law established by the *Crawford* v. *United States* case (212 U. S. 183) still prevails in a case involving a state of facts which are analogous to the *Crawford* case" (Br. 33). The rule enunciated in the *Crawford* case was legislatively repealed, however, by Congress when it enacted the Act of August 22, 1935, c. 605, 49 Stat. 682, D. C. Code (1940), Sec. 11–1420 (see Appendix, *infra*, pp. 64–65). Congress recognized the practical difficulties arising from the *Crawford* decision because of the large number of Federal workers in the District of Columbia. See 47 Mich. L. Rev. 844, 845. Appellant's notion that the law established by the *Crawford* case still prevails is laid to rest by the *Wood* case, *supra*, at p. 141, where the Court said:

> In the light of the English precedents, and in the absence of any satisfactory showing of a different practice in the colonies, we are unable to accept the ruling in the *Crawford* case as determinative here or to reach the conclusion that it was a settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, unrelated to the particular issues or circumstances of a criminal prosecution, created an absolute disqualification to serve as a juror in a criminal case.
>
> * * * Even if it could be said that at common law such a disqualification existed, we are of the opinion that

[8] See, also *Higgins* v. *United States*, 81 App. D. C. 371–372, 160 F. 2d 222, 223, cert. den. 331 U. S. 822; *Kempe* v. *United States*, 160 F. 2d 406, 410 (C. A. 8), cert. den. 331 U. S. 843; *United States* v. *Chapman*, 158 F. 2d 417, 419 (C. A. 10).

Congress had power to remove it. That point was not touched in the *Crawford* case.

III

The trial court did not err in denying the motion to return and suppress as evidence papers and property seized from the person of appellant at the time of her arrest since the arrest was lawful, and the search and seizure were incidental thereto

There is no merit to appellant's contention under Point II (Br. 48–67) that the court below erred in upholding the validity of her arrest and the search and seizure of her purse and its contents (Tr. 5011–5015). She argues that evidence was obtained through the seizure from her person of her purse without a search warrant, or her consent, in violation of the Fourth Amendment; and that the arrest without a warrant of appellant and her companion Gubitchev, which preceded the search, was also illegal in that (1) the arresting FBI agent did not, as required by 18 U. S. C., Sec. 3052, have reasonable grounds for believing that a felony had been committed and (2) there was no likelihood that she would escape before a warrant of arrest could be obtained.

Appellant's main attack (Br. 50) is directed to the alleged illegality of the arrest. If that can be established, she argues, it will follow that documents seized without a search warrant as an incident thereto are entitled to the constitutional protection against unreasonable search and seizure and should have been suppressed as evidence. *Johnson* v. *United States,* 333 U. S. 10; *Trupiano* v. *United States,* 334 U. S. 699. Appellee, on the other hand, contends that the arrest was lawful; and that the search and seizure were incidents thereof and hence not unreasonable within the condemnation of the Fourth Amendment as interpreted by decisions of the Supreme Court. *Carroll* v. *United States,* 267 U. S. 132; *Harris* v. *United States,* 331 U. S. 145; *Brinegar* v. *United States,* 338 U. S. 160.

While the arrest was made under 18 U. S. C., Sec. 3052, requiring probable cause and also likelihood of escape to justify arrest without a warrant by an FBI agent, there is no justification under the statute or the decisions for appellant's at-

tempt (Br. 50, 57–63) to inject, as a third condition precedent to the validity of such arrest, a requirement of proof that there was insufficient time to obtain a warrant before making an arrest. That requirement would eliminate the necessity of proving the other two and make meaningless the authorization to arrest without a warrant, inasmuch as the FBI agents may also under Section 3052 [9] serve warrants, which presupposes time in which to obtain them and excludes the emergency element. If the arrest is made without a warrant, the only requisites for validity are that the arresting agent have reasonable grounds for believing that the subject is guilty of a felony cognizable under the laws of the United States, and that there be a likelihood of escape before a warrant can be obtained.

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[9] The FBI statute was originally enacted in 1934 as one of the so-called "Crime Laws" sponsored by the then Attorney General Homer Cummings, and now reads as follows (18 U. S. C. Section 3052):

"The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest."

This statute parallels the common law doctrine on the right to arrest without a warrant, except that Congress added one new proviso, namely that there be a likelihood of the suspect's escaping before the arrest warrant can be obtained. "Reasonable grounds" and "probable cause" have been used synonymously by the courts in countless definitions, the substance of which "is a reasonable ground for belief in guilt". *Carroll* v. *United States*, 267 U. S. 132, 161. With regard to the proviso, the legislative history of the statute is not illuminating. As originally introduced in the House of Representatives, the bill, H. R. 9476, 73rd Cong. 2d Sess., did not contain that language. It merely empowered FBI agents "to make arrests without warrant for felonies cognizable under the laws of the United States, in cases where the person making the arrest had reasonable grounds to believe that the person so arrested is guilty of such felony". The House Judiciary Committee added the proviso respecting likelihood of escape, but gave no reason for such amendment. H. Rept. No. 1824, 73rd Cong. 2d Sess. The House report merely quoted the Attorney General's letter stating that the bill was necessary to correct an existing defect in law under which FBI agents had no specific statutory authority to carry firearms, serve warrants and subpoenas and *make arrests in emergency situations*. The bill passed the House and the Senate without debate before either body (78 Cong. Rec. pp. 10865–10866, 11677), and the Senate Report is silent on the proviso addition. S. Rept. 1434, 73rd Cong. 2d Sess.

A. The arrest was lawful because the arresting officer had reasonable grounds for believing appellant to be guilty of a felony, and the likelihood of escape existed

A factual account of this case, including the surveillances of appellant and Gubitchev by agents of the FBI, is set out at length in the Counter Statement, *supra*, pp. 1–13. Obviously, space limitations render it wholly impossible to repeat here what is there stated, but clearly the facts establish that probable cause for the arrest existed. The affidavit of Robert R. Granville, the arresting officer, which was received by the court below at the hearing on the issue of probable cause (Tr. 6),[10] discloses that all the facts subsequently testified to and recited in our Counter Statement were known to him in his official capacity at the time of the arrest.

The most recent pronouncement of the Supreme Court on the subject of probable cause is not *McDonald* v. *United States*, 335 U. S. 451, as appellant intimates in discussing the time element (Br. 60), but *Brinegar* v. *United States*, 338 U. S. 160, decided June 27, 1949.

The majority opinion in the *Brinegar* case states at 338 U. S. 175:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U. S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *United*

[10] This affidavit, which was received at the hearing on probable cause held on April 27, 1949, in the absence of the jury (Tr. 1–190), was of course part of the record (see Tr. 6 and Transcript of April 28, 1949, p. 9) upon which the trial court based its decision (Tr. 5011–5015) upholding the validity of the arrest.

Appellant refers (Br. 63) to the statutory restriction of Section 3052 that, in addition to probable cause, there must also be a likelihood of the suspect's escape before a warrant of arrest can be obtained. In reliance upon *United States* v. *Haberkorn,* 149 F. 2d 720 (C. A. 2), she then proceeds to draw an analogy from the facts in that case, which reversed an order denying the petition of an attorney "with an established office" in New York to have suppressed an affidavit seized *in a search of his office file room* following his arrest without a warrant on a charge of conspiring to obstruct justice. The decision was on the ground that there was lacking proof of any positive knowledge by the arresting FBI agent that "would plausibly lead him to the belief" that a defendant so situated was likely to escape. The court recognized, however, that "It would * * * not be impossible for a practicing attorney to be about to flee from punishment for a serious crime." Appellant asserts (Br. 65) that her places of residence and employment were at all times known to the Government agents and that there is absent evidence that prior to

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offices. The arrest was made by the New York agent at LaGuardia Field in that city. Citing the *Carroll, Dumbra, Husty,* and *Heitner* decisions above referred to, the Court of Appeals stated at 152 F. 2d 652:

"At the hearing of the motion to suppress, Ryan testified that he was told by the narcotic agents in Chicago that the defendant was there and was planning to leave by plane on the evening of July 8, 1944, and would arrive at LaGuardia Field at 8:30 on the morning of July 9. This proof, though based upon hearsay, was not from an informer. It is true that it was from the narcotic agent Belmont (the Newark, N. J., agent) who received the information from an unidentified informer, that Ryan first positively learned that the defendant was carrying smoking opium with him on his trip from Chicago to New York. There is no reason to suppose that hearsay evidence derived from an informer is not as competent evidence on which to show probable cause for an arrest as any other proof. The weight to be given it is a matter for the sound discretion of the court which was exercised on the motion to suppress."

Perhaps the best statement of the principle that hearsay evidence is sufficient to support probable cause for an arrest without a warrant, is that of Chief Justice Shaw, in *Commonwealth* v. *Carey,* 12 Cush. 246, 251 (quoted with approval in *Carroll* v. *United States,* 267 U. S. 132, 161):

"If a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, *or on facts communicated to him by others,* and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." [Italics supplied.]

the arrest she was attempting to or had made plans to escape. But the likelihood of Haberkorn's escape can hardly be compared with that of appellant who was acting in collusion with a national of another country, opposed to the interests of the United States, and was obviously aware of the danger of their contacts. The search in *Haberkorn,* moreover, was of an office room, not the person of the suspect, and the entry without a search warrant preceded the arrest and seizure, thus falling within the condemnation of *Johnson, supra.* Also, the Court of Appeals was evidently influenced by the fact that the agent had previously obtained one arrest warrant, and rightly concluded that a second was probably procurable.

Despite the general language of the excerpt from *In re Fried,* 161 F. 2d 453, 460–461 (C. A. 2), cert. dismissed 332 U. S. 807, quoted by appellant (Br. 65), that case does not construe the "likelihood of escape" element and is hardly in point on the facts, because the arrest was made *pursuant* to a warrant of arrest which the court held invalid.

Apparently there is no case prior to the *Haberkorn* decision which construed judicially the "likelihood of escape" element in Section 3052. *Barrett* v. *United States,* 82 F. 2d 528 (C. A. 7) and *Suhay* v. *United States,* 95 F. 2d 890 (C. A. 10), both involved the murders of Federal Bureau of Investigation agents while making arrests without a warrant. These decisions reviewed the FBI arrest statute as codified (prior to its present reenactment in Section 3052 of the new Title 18 on September 1, 1948), in 5 U. S. C. Section 300 (a). Both decisions turned on the existence of probable cause to make the arrests. See also comment on the effect of these decisions in *United States* v. *Bell,* 48 F. Supp. 986 (S. D. Calif.).

In re Morgan, 80 F. Supp. 810, 818 (N. D. Iowa), was a case where an individual, suspected of robbing a bank, voluntarily went to the bank with two FBI agents and a police officer. When a bank employee identified him, the agents placed him under arrest without a warrant. The court held this arrest valid under the statute.

"Escape" is defined in Webster's New International Dictionary as "1. To get away, as by flight *or other conscious effort* [emphasis supplied]; to break away, get free, or get

clear, from or out of detention. * * * 2. To avoid or elude a threatened ill."

The courts have always recognized that flight is a significant factor to be considered in determining probable cause for belief in guilt. *Husty* v. *United States,* 282 U. S. 694, 700–701; *Talley* v. *United States,* 159 F. 2d 703 (C. A. 5); *Jones* v. *United States,* 131 F. 2d 539, 541 (C. A. 10); *Levine* v. *United States,* 138 F. 2d 627, 629 (C. A. 2). It would appear therefore that Congress, in adding the "likelihood of escape" proviso to the probable cause requirement for arrest without a warrant under Section 3052, had in mind, or the section can be so interpreted to provide, an element *other than flight alone,* which had theretofore been included in both statutory and common law indicia of probable cause. Be that as it may, there is in this case undisputed evidence that both appellant and her companion were attempting to avoid observation and that the surveillance maintained on March 4, 1949, by the FBI agents, including Mr. Granville, had been at least *thrice* broken by deliberate actions on their part. (*Supra,* pp. 9, 11, 12.) It is clear that the observed conduct of appellant and Gubitchev on the night of their arrest afforded reasonable ground for the arresting agent's belief that there existed a likelihood of escape. Both were obviously making every effort to avoid detection, and, *a fortiori,* possible arrest. There could be no assurance on the part of Granville that appellant and Gubitchev would return to their respective homes or offices after their actions so clearly indicated their awareness of pursuit.

Little discussion need be had here on appellant's lengthy argument (Br. 57–63), that even when made on probable cause, an arrest without a warrant is illegal if the arresting officer had sufficient time to obtain a warrant before making the arrest. Assuming *arguendo* that there is any merit in this point, the very cases cited by appellant, notably *McDonald, supra,* negate it since they deal with *search* warrants, not warrants of *arrest.* In view of the special circumstances of this case, and of the contrasting seriousness of the offense which the arresting officer had reason to believe appellant committed, the concurring opinion of Mr. Justice Jackson in the *McDonald* case (335 U. S. at 457) is applicable. That opinion emphasizes that a

somewhat different standard is recognized as to the necessity, *even of obtaining a search warrant,* when the crime is one "which endangered life or limb or the peace and good order of the community." The Justice points out, with reference in footnote 1 to prior Supreme Court decisions on this point including *Trupiano* v. *United States,* 334 U. S. 699, that "it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not *malum in se* but only *malum prohibitum.*" [13]

In the *McDonald* case, moreover, the officers were "not responding to an emergency" (335 U. S. at 454). Appellant outlines in detail (Br. 56–59) testimony allegedly indicative of knowledge on the part of the FBI and of Mr. Foley as to her movements prior to leaving Washington on the 1: 00 p. m. train March 4th; the handling of what she terms the "decoy" report (Govt. Ex. 13), excerpts from which were subsequently found in her pocketbook; instructions that publicity releases would be made in Washington only; and the making available of Miss Manos to act as matron in the New York FBI office that night. Even assuming *arguendo* that the testimony supports her state-

[13] It is necessary to refute appellant's statement (Br. 61) to the effect that "In the *McDonald* case * * * even though the arrest was held legal, * * * the Supreme Court suppressed the evidence obtained without a search warrant," and that "the arrest was held legal only because the officers 'observed McDonald in the act of committing an offense' and 'they were under a duty then and there to arrest him.'" This is factually incorrect.

It was the *dissenting justices* who found the arrest in the *McDonald* case to be legal and justified their opinion thereby (335 U. S. at 461–463). The majority opinions carefully avoided such a finding and the discussion turned on the questionable validity of the seizures made following forced entry without a search warrant by the District of Columbia police upon premises in which the accused was a tenant, and by which means they were enabled to observe him engaged in the prohibited lottery manipulations. Reference to page 454 of the Court's opinion indicates that the quoted language at page 61 of appellant's brief is from the syllogism framed by the Court to summarize the Government's argument which allegedly sought "to build the lawfulness of the search on the lawfulness of the arrest and so justify the search and seizure without a warrant." The Court, however, did not "stop to examine that syllogism for flaws" but "assuming its correctness" rejected the result. This is a far cry from giving the Court's opinion in the *McDonald* case the conclusive effect that appellant now insinuates it has.

ments, it may be said that these arrangements were in justified preparation for the *eventuality* of appellant's arrest on that date, not proof that an arrest was actually intended. No one, least of all the arresting agent, could possibly foretell the events of that night, or to what extent the grounds already existing for belief that an offense had been committed would be augmented or diminished by the words or acts of the suspects *that night*. Events might or might not have been reaching a possible culmination point, but the evidence summarized by appellant does not prove that the arrest was planned for March 4, much less that the circumstances then known to the FBI justified an application for a warrant of arrest prior to the last surveillance. Appellant cannot have it both ways. If there was not probable cause in the circumstances of this case for believing that she was guilty of a felony, there was no basis for securing a warrant. If there was probable cause, the FBI was entitled to make the arrest without a warrant when they were also satisfied that appellant might escape.

B. The search of appellant's person and seizure of documents in her possession without a search warrant did not violate the Fourth Amendment because both were incidents of a lawful arrest and not unreasonable

It is axiomatic, both at common law and under American court decisions, that given a lawful arrest the person of the arrested individual may be searched. The power to search is not dependent on the power to arrest, but is considered a necessary incident thereto. *Carroll* v. *United States*, 267 U. S. 132, 158–159, where it is said:

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

This principle was recently reaffirmed by the Supreme Court in the *Brinegar* case, *supra,* and in *United States* v. *Di Re,* 332 U. S. 581, in respect of search of moving vehicles. In the latter case, the Court, while holding the arrest therein made to be invalid in its setting, at page 587 stated that if the defendant

"was lawfully arrested, it is not questioned that the ensuing search was permissible." In *Harris* v. *United States,* 331 U. S. 145 at 151, the Court points out that its prior decisions "have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control," citing, among others, *Agnello* v. *United States,* 269 U. S. 20, and *Weeks* v. *United States,* 232 U. S. 383.

It is true that the *Harris* doctrine was modified by the later decision of the Supreme Court in *Trupiano* v. *United States,* 334 U. S. 699, to the extent that the Court therein held that if sufficient time were available for obtaining a search warrant, failure to do so would invalidate the search of a *dwelling* despite the lawfulness of the contemporary arrest. It is thus clear from decisions of the Supreme Court upon which appellant relies, notably in the *Trupiano* and *McDonald* cases, that all deal with the necessity of obtaining a warrant prior to search of a home, or office following an arrest, and do *not* involve search of the person at the time of arrest. In *United States* v. *Rabinowitz,* 176 F. 2d 732 (C. A. 2), now pending on petition for writ of certiorari (October Term 1949, No. 293), in respect of Judge Learned Hand's application of the *Trupiano* doctrine to a search of an office without warrant following lawful arrest, the Court stated at page 735:

> That doctrine does not of course touch searches of the person when there has been a lawful arrest with or without a warrant; and we assume that a "search of the person" includes not only the clothing which he is wearing but the seizure of whatever is open and within his immediate reach.

The authorities clearly support the trial judge's conclusion in the memorandum on probable cause (Tr. 5014):

> The act of arrest and search in this case did not reduce the Fourth Amendment to a mere form of words or violate "the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities."—

quoting from *United States* v. *Wallace & Tiernan Company, Inc.*, 336 U. S. 793, 798, in reference to *Trupiano* v. *United States*, 334 U. S. 699, 705.[14]

IV

The trial court did not err in refusing to dismiss the indictment at the close of the Government's case

Under Point III of her brief appellant makes four rather unrelated contentions, three of which (A, B, and D) we will treat under this heading.

Appellant first contends (Br. 71–73) that the evidence failed to prove the commission of the crime charged in Count I of the indictment because no proof was offered that she transmitted, or attempted to transmit, information relating to the national defense to a person not entitled to receive it.

It is true that Count I does not specifically state under which of the five paragraphs of Section 793 of Title 18 appellant's alleged crime was committed. However, such specification is not necessary. *Hagner* v. *United States*, 285 U. S. 427, 433; *Berger* v. *United States*, 295 U. S. 78; *Hopper* v. *United States*, 142 F. 2d 181 (C. A. 9). The charge, as paraphrased by appellant (Br. 1), sufficiently apprised her of the nature of the offense by alleging that at the time and place mentioned she "did copy, take, make, and obtain documents, writing and notes connected with the national defense, etc.," for the purpose of "obtaining information respecting the national defense" with the prohibited intent and belief. The documents so copied and taken were then sufficiently particularized.

This phraseology adopts the words of the statute and plainly indicates that Count I was based on the *second* paragraph of said Section 793. There is no basis whatever for appellant's argument (Br. 71–73), upon which she postulates the claim of lack of proof, that the *only* provision of Section 793 applicable to her is the *fourth* paragraph (which she admits (Br. 73) is not the basis of Count I) penalizing, *inter alia*, the unlawful

[14] The Government does not question appellant's general statement (Br. 65–67) that the fruits of an illegal search may not be used for the purpose of proving that there was probable cause for making the arrest. However, neither the principle nor the cases cited in its support have any bearing in the circumstances of the instant case.

transmittal or communication, or attempting so to do, of documents relating to the national defense. The short answer, therefore, to appellant's claim, is that she was not charged under Count I with such communication or transmittal or an attempt to commit that offense in the District of Columbia. Since she was not charged with the crime penalized under the fourth paragraph of Section 793, the Government was not obligated to offer any proof thereof.

Appellant totally misreads the statute in claiming (Br. 72) that she "could not within the wording of Count I," have committed the alleged offense for the purpose of obtaining information of which she was already in possession by virtue of her employment, and that the Government admitted that she "obtained possession" of the information lawfully. True, appellant was an employee of the Department of Justice. But the charge was that she did her copying, etc. (and the proof so established beyond reasonable doubt), for the purpose of obtaining information respecting the national defense, intending and believing that it would be used to the detriment of the United States in aid of another country. Appellant copied information, available to her because she was an employee, in order that she might obtain it for such uses. Moreover, that was the precise issue submitted to the jury under the judge's charge (Tr. 8363); namely, whether appellant did her copying and extracting for the purpose of obtaining said information with such intent.

Appellant's second contention in respect to Count I (Br. 74–77) is that the Government failed to prove that the information represented by the twenty-two data slips (Exhibits 90a to 111a) was connected with the national defense so that the trial court should have dismissed Count I and directed a verdict. This claim is equally without substance. The only ground offered in its support is the statement made by the trial court in respect of twelve other data slips (Defts. Exs. 104–115) also taken from appellant's purse, which the Government did not wish to put in evidence because it believed that disclosure of the confidential matters therein contained would have been harmful to the interests of the United States. The trial court stated (Tr. 5008) with respect to the twelve

data slips that "they do not suggest danger to our national security or our national defense." From this remark, which was immediately followed by the judge's comment: "Now, that is from my viewpoint. You understand, I am not undertaking to express judgment * * * " (Tr. 5008), appellant argues that neither did the twenty-two data slips that were admitted suggest danger to our national security or defense. This conclusion does not follow, for neither statement had the effect of a finding by the court, although the subsequent ruling that all the data slips should go in evidence was the result of such "suggestion" to insure full protection to appellant (Tr. 5009–5011 and 5015–5016).

The application made of the judge's language is unjustified. The Government did not desire to use the twelve data slips because it believed that their publication would not be to the best interests of the United States and would harm its security (Tr. 5015). That was the question involved; the judge merely stated that in his opinion the publication of these data slips would not create "danger to our national security or our national defense" (Tr. 5008). Thus, the issue, and the judge's comment, did not refer to the relation of the documents to the national defense, but to the wholly different issue whether their publication would be injurious for security reasons.

Appellant finally contends (Br. 79–81) that the Government failed to prove that the papers which were taken from her were "filed and [sic] deposited" with the Department of Justice within the meaning of 18 U. S. C. 2071 (a). Although acknowledging that a paper "deposited" with a clerk, or officer of any court of the United States would be covered by the statute, appellant asserts that the wording of the provision is such with respect to papers in the custody of a public office as to require actual filing, i. e., actual endorsement with a filing stamp, before the statute applies (Br. 79). In this connection she states that the thirty-four data slips were not formally filed with the Department but they were her "personal memoranda."

However, the testimony and the stipulation regarding the typing on the data slips (Tr. 6211–6212) showed that the

appellant must have removed at least some of the data slips from the Department of Justice [15] (Tr. 4435, 4437, 4906, 7215, 7280), and that these data slips were official Government papers which had been in the custody of the Department of Justice (Tr. 238, 240, 249, 250, 251, 254, 256, 258, 259, 6211, 7149, 7150).

These papers having been clearly removed from the Department of Justice by appellant, the sole issue is whether or not they had been "deposited" with the Department within the meaning of the statute. The broad scope given to the word "deposited" and to Sec. 2071 as a whole by *Davidson* v. *United States,* 292 Fed. 750 (C. A. 3) and *McInerney* v. *United States,* 143 Fed. 729 (C. A. 1), which arose under the predecessor of this statute, resolves this issue.

Contrary to appellant's statement (Br. 79), Count II of the indictment is based not on Subdivision (a) of Sec. 2071 but upon Subdivision (b) thereof. Aside from this, however, the requirement of the statute that the documents to which it applies be "filed" or "deposited" with a public office, officer, etc., of the Government is in the disjunctive, not in the conjunctive as appellant seems to think. Thus, even if we assume that "filing" means marking with a filing stamp, it is wholly immaterial whether particular documents were actually "filed" with the Government if they were "deposited" with the Government. Obviously the data slips in question were "deposited" within the meaning of the section.

Appellant's contention that Count II should have been dismissed is thus clearly without merit, but in any event further discussion is not necessary since appellant's sentence under the second count runs concurrently with that under the first.[16] It is well settled that where sentences on more than one count are to run concurrently, if the conviction on one count can

[15] Govt. Exs. Nos. 90a–100a and 111a, Govt. Exs. 104a–110a, Defts. Exs. 104–106, and Defts. Exs. 114–115. See the stipulation, Tr. 6211–6212.

[16] Appellant was sentenced to not less than 40 months and not more than ten years on the first count, and to not less than one year and not more than three years on the second count, the sentence on the second count to run concurrently with that on the first count (Tr. 8486–8487).

be supported questions raised with respect to the other count need not be considered. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Brooks* v. *United States,* 267 U. S. 432, 441; *Gorin* v. *United States,* 312 U. S. 19, 33.

V

Appellant was not denied a fair trial because of alleged errors in cross-examination and the admission of certain evidence

Appellant asserts (Point VI, Br. 101–105) that she was cross-examined on the basis of an exhibit not introduced in evidence and, therefore, that prejudicial error was committed. This contention is totally without merit.

When arrested appellant had in her possession character sketches of Alfred Boynton Stevenson, Loraine Elkin Sinderbrand, and Alvin Sinderbrand, together with a sketch of her own educational background (Govt. Ex. 115) which she prepared the Thursday night prior to her arrest on Friday, March 4, 1949 (Tr. 7880). Appellant testified that she prepared these sketches for use in connection with a novel which she was writing (Tr. 7873, 7880).

When appellant was under cross-examination, the Government marked for identification a document entitled "The Report of the Royal Commission of Canada to Investigate the Facts Relating to the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power" (Govt. Ex. 166 for identification; Tr. 7882). This exhibit was shown to appellant, who admitted having read portions of it (Tr. 7882–7883). Her attention was directed specifically to pages 50 and 51 of the report with the request that she read them to herself (Tr. 7883). Those pages recited that the Canadian government had obtained a secret Russian document outlining the data and information to be furnished with reference to Canadian nationals who might be recruited for Russian espionage activities (Tr. 7884–7885). Apparently the significance of this specific examination did not escape appellant who immediately began to fence with her questioner (Tr. 7884) and government counsel was forced to read her the portions which he had previously indicated that she should

read (Tr. 7885). Appellant was then asked to read additional matter in the report and did so aloud at the direction of her counsel (Tr. 7886). Further questioning by the prosecutor, over objections which the court overruled (Tr. 7887), then elicited the admission by appellant that the data contained in her sketches corresponded exactly with the information sought by this Russian secret memorandum on espionage recruits which had been secured by Canadian officials, even to the coincidence of information about the "personal, positive, and negative sides" of the prospect (Tr. 7885–7901; 7895).

It is submitted that, although the Canadian Report was not placed in evidence and no claim is made that appellant participated in its preparation, the cross-examination complained of was proper. Certainly it tended to controvert appellant's assertion that her "sketches" were innocently prepared.

It is well established that cross-examination may be utilized for the purpose of impeaching the credibility of a witness. *Lindsey* v. *United States,* 77 App. D. C. 1, 133 F. 2d 368. On direct examination appellant had attempted to dispel any connotation of impropriety from her preparation of the "sketches." The Government therefore was permitted to refute that testimony in the course of a full cross-examination. Certainly this cross-examination threw light upon the matter and focused the attention of the jury upon an issue which had "the ultimate tendency to lessen the credibility of the witness." See *Ellis* v. *District of Columbia,* 45 App. D. C. 384; *Ambrose* v. *United States,* 45 App. D. C. 112. In any event, the extent of the cross-examination rested in the sound discretion of the trial judge and no abuse of that discretion is here shown. *Lindsey* v. *United States, supra.*

The Canadian Report had a bearing on appellant's defense and could properly be utilized on cross-examination. *Chang Sim* v. *White,* 277 Fed. 765 (C. A. 9). Nor was there error in permitting appellant to identify the document or to be questioned in respect thereof, without introducing it in evidence. *Richards* v. *United States,* 175 Fed. 911 (C. A. 8), cert. den. 218 U. S. 670. Even if it should be held that the Canadian Report would not be material or relevant on direct examination, it does not thereby become improper on cross-examination if it

fairly and reasonably goes to the credibility of the witness. See *Klein* v. *Russell,* 19 Wall. 433.

Appellant further contends (Br. 105–110) that evidence of her registration at hotels in Baltimore and Philadelphia on January 7 and 8, 1949, respectively, with an individual as man and wife was inadmissible and improper cross-examination, because it showed the commission of the crime of fornication, which appellant had denied, both in respect of the hotel registrations (Tr. 7480–7481) and a night spent with that individual in the apartment of a friend of his in Washington (Tr. 7478). Appellant admitted on cross-examination, however, that she had occupied the same room in said hotels with said individual on the nights in question (Tr. 7480) and that she had spent several nights with him in his own apartment in Washington, including the night of February 17, 1949, prior to her meeting with Gubitchev the next day in New York (Tr. 7478–7479). All this was proper cross-examination to refute appellant's explanation on direct examination of her clandestine meetings with Gubitchev from September 1948 on (Tr. 6917, 6934, 6945), as inspired by an attraction that ripened into love, the depth of which she reiterated upon cross-examination (Tr. 7467–7469, 7471, 7475–7476) before the hotel registration evidence was introduced.

It is well established that distinct and different crimes independent of that for which a defendant is on trial may not be used to establish the guilt of the accused. *Pyle* v. *United States,* 81 App. D. C. 209, 156 F. 2d 852, upon which appellant relies, clearly enunciates that rule. Without adverting to the many recognized exceptions to the general rule it is submitted that relevant evidence tending to prove or disprove a material fact is not rendered inadmissible because it tends to show that the accused committed another and separate offense. *Bracey* v. *United States,* 79 App. D. C. 23, 142 F. 2d 85, cert. den. 322 U. S. 762; *Means* v. *United States,* 62 App. D. C. 118, 65 F. 2d 206; *Eagles* v. *United States,* 68 App. D. C. 122, 25 F. 2d 546, cert. den. 277 U. S. 609.

Clearly the evidence of appellant's associations with this individual was competent to refute her testimony of a romance with Gubitchev. Nor was the cross-examination objectionable

because it disclosed sordid incidents in her life. See *Bracey* v. *United States, supra,* 142 F. 2d at 89, wherein this Court stated:

> In fact, the situation of the present case provides a good example of the necessity for permitting the trial judge to exercise considerable discretion in admitting or rejecting evidence. He observes the conduct of counsel, the reactions of the witness under examination and the resulting effect upon the jury. In other words, he is aware, as no appellate court could be, of the court-room psychology and, hence, is in a position to determine whether particular testimony should or should not be received. If, under such circumstances, offered evidence is otherwise admissible and relevant, the fact that it may tend to prove the commission of another offense does not make it inadmissible. And, neither does the fact that, incidentally, it may injuriously affect the character of the accused with the jury. Appellate courts are especially unwilling to override the exercise of discretion by trial judges in such circumstances.
>
> The reason given by the trial judge for admitting the disputed testimony is supported, also, under another exception to the general rule of exclusion heretofore discussed; namely, that evidence which incidentally reveals the commission of a crime other than the one named in the indictment may, nevertheless, be received if it tends to defeat the defensive theory or rebut an issue raised by the defense.

In the instant case the trial judge in his discretion properly ~~admitted~~ ALLOWED the challenged cross-examination of the defendant and permitted the introduction into evidence of the exhibits showing the hotel registrations.[17]

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[17] Short shrift can be made of appellant's additional contentions (Point VI, C and D; Br. 110–113) that she was denied a fair trial by reason of the trial court's remarks in respect of certain evidence. Contrary to appellant's contention (Br. 110–111), the court did not state at referenced Tr. 3686 that no discrepancy existed between the prior testimony of the five FBI agents and their subsequently admitted surveillance notes (Govt. Ex. 79, Tr. 3649), thereby removing this factual question from the jury's consideration. The court's statement "That is what he said" refers not to the prior testimony

VI

The evidence was sufficient to support the finding of guilt

Appellant urges under Point III–C (Br. 77–78) that the court should have directed the entry of a judgment of acquittal at the conclusion of the Government's case on the ground of insufficiency of the evidence. In Point IV (Br. 82–85) she makes the same contention respecting the sufficiency of the evidence at the conclusion of the entire case. We submit that there is no merit whatever to either of these contentions.

It is obvious from our Counter Statement, *supra*, pp. 1–13, that at the conclusion of the Government's case its evidence was amply sufficient to raise a question for the jury. Limitations of space, of course, prevent us from repeating the facts detailed in our lengthy Counter Statement, but a reading thereof convinces that no jury could have done otherwise than return a verdict of guilty. The proof showed that appellant,

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but is in answer to the interjected question of appellant's counsel to the witness Garde's reading from his notes as to whether they read "striking at him". Additional colloquy on this alleged discrepancy was made out of the jury's presence (Tr. 3740–3745), hence no prejudice resulted.

Likewise, with regard to the judge's refusal to allow certain FBI reports introduced in evidence by appellant (Nos. 104–A, Tr. 5218; 105–A, Tr. 5220; 106–A, Tr. 5214; 107–A, Tr. 5221; 108–A–1, 108–A–2, Tr. 5222; 109–A, 110–A, 111–A, 112–A, 113–A–1 thru 113–6, 114–A, 115–A, 116, 117, 118, 119, 120, 121, 122, 123–1, 123–2, 124, 125, 126, 127, 128, Tr. 5223) to be taken to the jury room without certain red markings theretofore made by the Government (Tr. 5242). That decision was within the judge's discretionary power, which contrary to appellant's contention (Br. 111–113) was not abused to her prejudice. *Buckner* v. *United States*, 81 App. D. C. 38, 154 F. 2d 317; *Murray* v. *United States*, 76 App. D. C. 179, 130 F. 2d 442.

It appears that after the exhibits were in evidence, with the red markings, defense counsel charged that government counsel had altered the documents and requested the court to order "other records substituted in their place instead without the markings." (Tr. 5454–5458.) The trial judge denied the request stating "we may erase the red marks. They may be erased. The jury will not have the papers at all." (Tr. 5458.)

The jury, while considering their verdict, requested the exhibits in the case. In an effort to save the trial judge the necessity of deciding every wrangle with defense counsel, government counsel discussed the matter of the exhibits with defense counsel and it was agreed between them, as reported to the trial judge, that the jury might have the data slips, the contents of the defendant's purse and the reports of the Federal Bureau of Investigation in question, but that defense counsel had objected to the reports of the FBI "because they contain these marginal lines that were mentioned in the

an employee of the Department of Justice (1) was relieved of the assignment of screening confidential FBI reports relating to the internal security of the United States (e. g., Tr. 264–267); (2) that she objected to such change in assignment and thereafter persuaded her successor to give her fifty or sixty such reports (e. g., Tr. 266–270, 409–418); (3) that she made persistent attempts to gain access to the top secret FBI report (e. g., Tr. 287–291); (4) that she met Gubitchev on three occasions in New York City where they so behaved as to convince that they were espionage agents maneuvering for the purpose of detecting whether they were being surveilled and, if so, evading the surveillance (e. g., *supra*, pp. 6, 8–9, 11); [18] and (5) that following her arrest documents containing information relating to the internal security of the United States were found in appellant's purse (e. g., Tr. 4426–4427, 4438).

A glance at the documents seized from appellant refutes any possible doubt of guilt. To summarize the 34 data slips within space limitations is impossible, but we may refer to 6 of them, 4 from the group of 22 which were Government Exhibits and 2 from the group of 12 which were Defense Exhibits. Both groups were received in evidence during the Government's case and there is no practical distinction between them.

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testimony" (Tr. 8388). Mr. Whearty, of government counsel, suggested that he would attempt to obtain substitute copies but he gave no assurance that the copies could be obtained (Tr. 8388, 8391). Mr. Whearty at that time suggested the possibility of erasing the marks (Tr. 8392) and, as the jury was then out on the noon recess, counsel agreed to report back to the trial judge.

After recess, the government attorneys advised that they had attempted to use an electric eraser to remove the markings (Tr. 8393) since they could not obtain unmarked copies within a reasonable time (Tr. 8397). Defense counsel, however, refused to permit the use of the copies with the erasure marks or to accede to the suggestion of government counsel that these copies go to the jury with appropriate instructions by the trial judge that the jury disregard the markings (Tr. 8394–8401). In view of defense counsel's objection the trial judge concluded not to send these exhibits to the jury pending further request from them (Tr. 8401). It is to be noted that the jury did not again make a request for the documents in question.

[18] So successful were these maneuvers that on the night of January 14th Gubitchev broke the surveillance on him (e. g., Tr. 502–504, 802), and on the night of March 4th he and appellant either singly or together broke the surveillance on at least three occasions (e. g., Tr. 1614–1615, 2316–2317, 3319–3320, 3755–3756).

Government Exhibit 90 (a) was the following extract from an FBI report (Defendant's Exhibit 116, Tr. 5771–5806), covering 36 pages of the Transcript:

> C–279, who is familiar with the activities of the Russian Embassy personnel, advised that he has received no info indicating that any person in the Swiss legation might be connected with Soviet Intelligence activities. The Informant has observed, however, that Eric Kessler, Counselor, Swiss Legation, has been in contact with Soviet Embassy personnel, but informant has obtained no info re these contacts which would indicate that Kessler was engaged in more than his official business.

Government Exhibit 95 (a) was the following extract from an FBI report (Defendant's Exhibit 121, Tr. 6118–6125), covering 8 pages of the Transcript:

> Reference Bureau letter, 3/26/48, authorized investigation of Stojan Krstic, employed by Yugo Consulate at Chicago, in order to verify and implement info that subject is engaged in intelligence activities as agent of UDB at Yugo Consulate.

Government Exhibit 100 (a) was the following extract from an FBI report (Defendant's Exhibit 125, Tr. 5869–5879), covering 11 pages of the Transcript:

> Reference teletype indicated that Dept. of State source advised that the individual who filed passport application on 9/21/34 in name of Charles Francis Chase, was believed to be a Soviet Agent who also used name of John Sherman.

Government Exhibit 103 (a) was the following extract from an FBI report (Defendant's Exhibit 128, Tr. 5842–5852), covering 11 pages of the Transcript:

> Subject reported by Informant as suspected of working for Bulgarian or Russian Intelligence Services. Believed to have obtained UN position thru Boyan Athanassov so that he might have freedom of movement in US. Subject at present in Immigration Section, Dept. of Social Affairs at UN.

Defendant's Exhibit 104 was the following extract from an FBI report (Tr. 5310–5344), covering 35 pages of the Transcript:

> On 12/27/47, T–1, an informant of known reliability, who is familiar with affairs of Leonid Ivanovich Pavlov, Third Secy and former head of the "USSR Information Bulletin", advised that Saron stated that she had previously seen Pavlov re a position with the "Bulletin". In connection with her application, informant advised that on the above date, she (Saron) furnished Pavlov with a summary of her background and experience as follows, etc. Informant stated that Saron said she was very much interested working with the "Information Bulletin". She claimed to be completely familiar with office practice thereof though not an expert proofreader nor editorial writer.
>
> According to T–5, Tseko Etropolski, First Secy, Bulgarian Legation, is the party whip in the Legation and has taken on administrative functions so far as security is concerned. The informant states that his duties are limited to propaganda and intelligence work. He has been in contact with the Soviet Embassy and with reps of other Satellite diplomatic representations.

Defendant's Exhibit 106 was the following six-word extract from an FBI report (Tr. 5235–5251), covering 17 pages of the Transcript:

> Stuart Legg—possible Russian espionage agent.

Beyond the slightest shadow of doubt such excerpts, the only information taken by appellant from lengthy reports and all dealing with the identity of suspected Russian espionage agents, conclusively demonstrate that appellant's only purpose could have been espionage. It is beyond the realm of credibility to suppose that anyone would extract information of such vital significance to the Soviet Government and then meet a highly placed Russian national under the circumstances of this case for any other purpose.

True, appellant sought to explain her meetings with Gubitchev as being the result of a romance (Br. 9–17). She sought to explain the presence of the data slips and other documents

found in her purse on various grounds, i. e., she was going to use them to prepare for a Civil Service examination, to use them in a novel she was writing, etc. (Tr. 7280–7281, 7309–7310, 7388–7391, 7597, 7833, 7838–7841; 7350, 7386, 7406–7408). However, it was for the jury to weigh this testimony and decide whether to believe the Government's, or the appellant's version of the case. They chose to believe the former. Considering the proof of appellant's relationship with another man during the period of her alleged romance with Gubitchev (see Point V hereof); considering appellant's admission on direct examination that she had no manuscript of her proposed novel because she destroyed it after her arrest (Tr. 7336); and considering the utter absurdity of any claim that a data slip containing only the words "Stuart Legg—possible Russian espionage agent" would be of any use in preparing for a Civil Service examination, it is obvious indeed why the jury did not believe appellant.

The Government agrees, of course, with the cases cited by appellant (Br. 78, 83–84) enunciating the well-known rules that an inference cannot be based upon another inference, and that an acquital should be directed unless the evidence excludes every other hypothesis except that of guilt. We need only say that those rules are plainly inapplicable here.

VII

The Government's summation was neither unwarranted nor prejudicial

Appellant asserts (Point VII, Br. 113–119) that certain statements made by Mr. Kelley, the Government prosecutor, in his summation, were inflammatory and highly prejudicial. There is no merit to this contention.

At the outset we would call the Court's attention to the personal vilification and abuse of the prosecutors, Kelley and Whearty (Tr. 8192–8194; 8197–8199, 8202), and the evil intentions imputed to the Government, by appellant's counsel in his closing argument (Tr. 8189–8273), and indeed throughout the trial (e. g., 7253, 7276). However, it is obvious that Mr. Kelley resisted the temptation to reply in kind.

Appellant objected to and now cites (Br. 113–114) as an appeal to prejudice, the tribute paid by prosecutor Kelley to the skill and cunning of Russian espionage agents in the United States; she complains that the record contains no such testimony. Inasmuch as the charge was that appellant, an employee of the United States Government, had obtained information from the confidential files of the Department of Justice, and the evidence showed that Gubitchev was a highly placed Russian national, the prosecutor was justified in ascribing to Russian agents a degree of cunning, skill and zeal which they themselves would be the last to deny.

Appellant further asserts (Br. 114–115) that there is no evidence in the record to support Mr. Kelley's statement that appellant had been carefully screened and picked by Russian espionage agents. But the gravamen of the charge supports such an inference, and the prosecutor could properly argue the inference that appellant had been carefully chosen for the task to which she was assigned. The prosecutor's additional language complained of (Br. 116) merely illustrated the carefulness of that choice and was another justified inference. To say that the Russian agents were not deceived by appellant's innocent pretty face, but found in her what they wanted—a core of hatred for many things and people including the United States; willing to sell out her country; with a certain type of courage, quick-witted, alert, unafraid; in short a clever spy—is merely to rebut the impression appellant and her counsel strove to create in the minds of the jury throughout the trial. She was pictured as a sweet, naive, scholarly, unworldly girl who, rather than engaging in espionage activities, was the unfortunate victim of a blasted romance with Gubitchev, a married man. To refute that impression, deftly created by appellant, the prosecutor characterized her as one whose acts were those of a spy and who hated her country. It was appropriate for the prosecutor, in fact it was his duty, to destroy this false and fictitious impression and to show her for what she was. Removal of confidential documents, intending their use for a foreign country in detriment to the interests of the United States, cannot be characterized as love of one's own country or indicative of a patriot.

Appellant utilizes most of her closing paragraphs (Br. 117–119) [18a] of Point VII to criticize the prosecutor's remarks as being similar to those of the prosecutor in *Berger* v. *United States*, 295 U. S. 78. In that case, however, the conduct of the prosecutor, not only in argument but throughout the entire trial, was so gross and reprehensible as to be clearly violative of the right to a fair trial. That situation did not obtain in the instant case, and it cannot be said that the incidental remarks of Mr. Kelley had the tendency to create a prejudicial atmosphere injurious to appellant. The theory of the indictment here, which the evidence substantiated, is that appellant had engaged in espionage activity. This Court said in *Lomax* v. *United States*, 37 App. D. C. 414, 419, that a "prosecuting officer is at liberty to form his own theory of a case and to pursue it in the course and manner of the trial, so long as the theory is consistent with the evidence." See also *Harris* v. *United States*, 63 App. D. C. 232, 71 F. 2d 532, 535, cert. den. 293 U. S. 581; *Stephan* v. *United States*, 133 F. 2d 87 (C. A. 6), cert. den. 318 U. S. 781. The prosecutor in his argument is not limited to an exposition of the facts in the manner appropriate to a lecture. *DiCarlo* v. *United States*, 6 F. 2d 364 (C. A. 2). He is permitted to argue the facts in the case, and in the course thereof, to draw such reasonable and appropriate inferences as may be deducible from those facts. *Harris* v. *United States*, *supra*. In the course of that argument he may use vigorous and descriptive terms, and appellant cannot complain if the remarks are justified by the evidence or draw appropriate inferences therefrom. Flattering or euphonious language need not be employed. *Green* v. *United States*, 266 Fed. 779 (C. A. 8), cert. den. 256 U. S. 689.

The trial judge, in his discretion, overruled the appellant's exceptions to the challenged remarks of the prosecutor, thus indicating that they did not offend the rule in the *Berger* case. Moreover, in his charge (Tr. 8367) the judge instructed the

[18a] Appellant also asserts (Br. 117) that the prosecutor's reference to Gubitchev's indictment and $100,000 bail bond was prejudicial and unsupported by any testimony in the record. On the contrary, both matters were brought out by appellant's counsel (Tr. 4167, 7085), hence she has no cause for complaint.

jury that they were not to consider "as evidence remarks or innuendos of counsel." Even if we assume *arguendo* that the remarks were prejudicial, the judge's instructions plainly cured any possible error.

VIII

The charge to the jury was not deficient in any substantial respect

Appellant challenges the charge to the jury (Point V, Br. 85–100) in several respects none of which, we submit, presents a question of substance. We treat the contentions *seriatim* in the order in which they are urged by appellant.

A. Appellant points (Br. 86–90) to the trial judge's comment that it was undisputed that the information contained in the data slips related to national defense, and argues that the court failed to submit to the jury the question whether the information did relate to the national defense. However, when the charge is read as a whole, as it must be,[19] it becomes plain that the jury was instructed on this issue and in accordance with what appellant requested.

In her requests to charge, appellant requested the following instruction (Tr. 8319):

> That a necessary element of section 793 of Title 18, United States Code, the alleged violation of which the defendant is charged with under count 1 of the indictment is that the documents, writings, and notes mentioned in that section are connected with the national defense.

The court rejected the request, apparently for the reason that it proposed to cover the point in other language in the main charge. Examination of the charge discloses that the trial judge made it clear to the jury that it was his function only to determine the law of the case (Tr. 8356) and that the determination of all issues of fact was the function of the jury. The court explained to the jury that it would comment on the evidence for the guidance and assistance of the jury, but the jury was repeatedly cautioned that it was their recollection of

[19] *Kinard* v. *United States*, 69 App. D. C. 322, 101 F. 2d 246.

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The charge to the jury was not deficient in any substantial respect

Appellant challenges the charge to the jury (Point V, Br. 85–100) in several respects none of which, we submit, presents a question of substance. We treat the contentions *seriatim* in the order in which they are urged by appellant.

A. Appellant points (Br. 86–90) to the trial judge's comment that it was undisputed that the information contained in the data slips related to national defense, and argues that the court failed to submit to the jury the question whether the information did relate to the national defense. However, when the charge is read as a whole, as it must be,[19] it becomes plain that the jury was instructed on this issue and in accordance with what appellant requested.

In her requests to charge, appellant requested the following instruction (Tr. 8319):

> That a necessary element of section 793 of Title 18, United States Code, the alleged violation of which the defendant is charged with under count 1 of the indictment is that the documents, writings, and notes mentioned in that section are connected with the national defense.

The court rejected the request, apparently for the reason that it proposed to cover the point in other language in the main charge. Examination of the charge discloses that the trial judge made it clear to the jury that it was his function only to determine the law of the case (Tr. 8356) and that the determination of all issues of fact was the function of the jury. The court explained to the jury that it would comment on the evidence for the guidance and assistance of the jury, but the jury was repeatedly cautioned that it was their recollection of

[19] *Kinard* v. *United States*, 69 App. D. C. 322, 101 F. 2d 246.

the facts rather than the court's which they should follow (Tr. 8356–8357, 8364).

It was after these preliminary instructions concerning the respective functions of the court and jury that the court pointed out the undisputable fact that the information contained in the data slips related to national defense. When the court left the subject of the evidence and discussed the requirements of the statute, the court several times made it clear to the jury that they, not the court, were required to determine whether the information on the data slips related to national defense.

1. When discussing the constitutional power to enact the statute which the defendant was charged with violating, the trial judge stated (Tr. 8360–8361):

> * * * As you know, another object to [of] our Constitution and our Government is, to "insure domestic tranquility". This is essential for the peace and well being of our citizens. To secure both of these objectives, the one providing for the common defense, and the other insuring domestic tranquility, the Congress properly enacted a statute which forbade that any person should copy or take any document, writing, or note thus collated by our Intelligence Service, *if such document, writing or note was connected with the national defense*[20] and if the person thus copying it and taking it did so with the intent and with reason to believe that the information contained in such document, writing, or note was to be used to the injury of this country or to the advantage of a foreign country.

2. In referring to the indictment, the court stated (Tr. 8361):

> * * * By such indictment, and by the first count thereof, it was charged that, on or about the period between December 10, 1948, and March 4, 1949, she, the defendant, did copy and take specified documents, writings or notes *connected with the national defense,* and that she did so for the purpose of obtaining information *relating to the national defense* * * *.

[20] The italics in the quotations have been added.

3. When instructing the jury on reasonable doubt the court stated (Tr. 8365):

> If you should find and believe from the evidence in this case beyond a reasonable doubt, as I have heretofore defined reasonable doubt, that Judith Coplon, the defendant, did within the period mentioned in the indictment * * * copy or take the documents, writings, or notes mentioned in the indictment and in the evidence, and that she did so for the purpose of obtaining *information in connection with our national defense,* and with the intention, and with reason to believe, that such information thus obtained was to be used to the injury of the United States and to the advantage of a foreign country, then it would be your duty to return a verdict of guilty on the first count of the indictment.

4. In discussing the issue of the defendant's intention, the court stated (Tr. 8366):

> Since it is the contention of the Government that the documents, writings, or notes, commonly known as data slips, taken by the defendant and found in her possession were taken or copied *for the purpose of obtaining information relating to our national defense,* * * * the defendant's intention becomes an important issue in the case.

All that appellant asked was that the jury be instructed that the information contained in the data slips must relate to national defense. The excerpts which we have noted above demonstrate that on several occasions in the course of the charge the court referred to this element of the offense in almost the identical terms set forth in the requested charge. It is a fair inference that appellant recognized this in the trial court, for at the conclusion of the charge numerous exceptions were taken but, contrary to appellant's present assertion, she did not except to the charge on the ground that the court had not adequately instructed the jury that the information contained in the data slips must relate to national defense.

In evaluating appellant's contention it is significant to note that unlike the situation in *Gorin* v. *United States,* 312 U. S.

plain terms that "whatever I may say to you on the question of the evidence is not binding upon you" (Tr. 8356–8357).

E. The same answer applies to appellant's contention (Br. 92–93) that the trial judge usurped the function of the jury by stating that it should not be hard to answer the question as to whether the appellant intended or had reason to believe that the information contained in the data slips was to be used to injure the United States and to the advantage of a foreign country (Tr. 8368).

The judge, as will be seen from the charge, was commenting on the testimony (Tr. 8368) and in the course thereof made the statement that the jury should have no difficulty in determinging from the evidence whether the appellant intended or had reason to believe that the information on the data slips was to be used to the injury of the United States and to the benefit of a foreign country. The comment went to the point that the jury could easily decide that issue but the jury were not told the conclusion it should reach.

F. By a tortured process of involved reasoning, appellant argues that the judge instructed the jury that they might draw one inference from another inference in determining the guilt of the appellant.

In the course of the charge, the trial judge stated that one of the questions to be decided by the jury was whether the appellant intended to deliver the data slips to Gubitchev (Tr. 8368) and if the jury found that was her intent, that they should next consider whether she intended or had reason to believe that the information contained in the data SLIP was to be used to the injury of the United States and to the advantage of a foreign country (Tr. 8369). This did not direct the jury to pile inference upon inference; the jury was told that they should ascertain certain facts and that they must first ascertain whether the appellant had a certain intent. The judge then related that if the jury determined the appellant had the required intent, they should consider an additional matter. This was nothing more than pointing out to the jury the elements of the offense and the matters which they should consider. It is farfetched, we submit, to torture this portion of the charge into the contention here stressed by the appellant.

See *United States* v. *Heine*, 151 F. 2d 813 (C. A. 2), certiorari denied, 328 U. S. 833.

G. Appellant's objection to the portion of the charge stating that there was no question that the data slips were in the possession of appellant, and that the same had been removed from the Department of Justice, and her further objection to the refusal to give Requested Instructions 27 and 28 (Br. 94–95, Tr. 8324), are without merit. Appellant's possession of the data slips was in fact undisputed; their removal from the Department of Justice is treated in our Point IV, *supra*.

H. Requested Instructions 16 and 18 (Br. 95, Tr. 8321–8322) were properly denied. The former was completely inaccurate since it would have told the jury that if appellant had possession of material in her capacity as an employee of the Department of Justice, she could not have copied it for the purpose of obtaining information respecting the national defense. The latter would have told the jury that there was no evidence that the defendant attempted to transmit any documents, etc. Of course, there was an abundance of such evidence, but in any event transmittal or attempted transmittal was no part of the offense.

I. Appellant argues (Br. 96) that it was error to deny Requested Instructions 36 and 37 (Tr. 8327) which, in effect, stated that if the evidence reasonably permitted a hypothesis of innocence, a verdict of not guilty was required. The same concept was brought home to the jury in the instructions on reasonable doubt and burden of proof (Tr. 8363–8364) and, hence, appellant has no basis for complaint. The suggestion that the instructions were too vague is not open to appellant now since she made no such objection when the charge was given and, if necessary, could have been corrected. Rule 30, F. R. Crim. P.

J. The appellant complains (Br. 96) that the trial judge did not properly charge with reference to reasonable doubt. An examination of the charge shows that the judge fully and completely instructed the jury with reference to this matter (Tr. 8363–8364). It is not necessary that the point be repeated with respect to each particular issue. *Eierman* v. *United States*, 46 F. 2d 46 (C. A. 10); *United States* v. *Siden*, 293 Fed. 422 (D. Minn.).

The appellant's requested charge 39 (Tr. 8328) was denied and the judge charged fully, if not in the language requested by the appellant, with reference to the requirement that the jury be convinced beyond a reasonable doubt before they could convict.

K. The appellant, when testifying in her behalf, asserted that she had been entrapped. The trial judge charged the jury concerning this contention of the appellant and at the conclusion of the charge, the appellant excepted (Tr. 8371–8372; 8377–8378). The appellant, however, at that time, did not direct the attention of the court to any erroneous statement of fact in the charge. We know of no misstatement of fact in the charge, as appellant urges, but in any event, if the charge contained any misstatement of fact relating to the matter of entrapment, the jury had been instructed as to their function with reference to the facts and that their recollection should prevail.

There was ample evidence offered by the government showing that the appellant was believed by agents and officers of the government to have been engaged in espionage activities, and that this belief existed prior to the incident of the Amtorg report. Under the circumstances, affording the appellant an opportunity to violate the espionage statute, which resulted in her arrest, was permissible. *Sorrells* v. *United States,* 287 U. S. 435.

It is difficult to comprehend the basis of the appellant's assertion that the trial judge should have instructed that the government agents and officials must have had probable cause to believe that she was engaged in criminal activities at the time of the alleged entrapment. The trial judge, it is submitted, gave a broader and more favorable charge than that for which the appellant here contends; he instructed the jury that if the appellant was induced by government officials, for any reason, to remove the documents, there would be an entrapment.

The only evidence of entrapment was that offered by the appellant. The government controverted that testimony. The court charged entrapment in terms favorable to appellant, and the jury rejected appellant's claim of entrapment as unfounded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

18 United States Code, Section 793, reads as follows:

Gathering, transmitting, or losing defense information.—Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any other prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army or Navy is being prepared or constructed or stored, information as to which the President has determined would be prejudicial to the national defense; or

Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or

obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; [1]

Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

Whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

Whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed—

[1] Count I of the indictment is based solely upon the above italicized paragraph.

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 United States Code, Section 2071, reads as follows:

Concealment, removal, or mutilation generally—

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

18 United States Code, Section 3052, reads as follows:

Powers of Federal Bureau of Investigation.—The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

Act of August 22, 1935, ch. 605, 49 Stat. 682; D. C. Code 1940, Section 11–1420, reads as follows:

Exemption from jury service—Government employees qualified—Salary not diminished.

All executive and judicial officers of the Government of the United States and of the District of Columbia, all officers and enlisted men of the Army, Navy, Marine Corps, and Coast Guard of the United States in active service, those connected with the police and fire departments of the United States and of the District of Columbia, counselors and attorneys-at-law in actual practice, ministers of the gospel and clergymen of every denomination, practicing physicians and surgeons, keepers of hospitals, asylums, almshouses, or other charitable institutions created by or under the laws relating to the District of Columbia, captains and masters and other persons employed on vessels navigating the waters of the District of Columbia shall be exempt from jury duty, and their names shall not be placed on the jury lists.

All other persons, otherwise qualified according to law whether employed in the service of the government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided,* That employees of Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law.

U. S. GOVERNMENT PRINTING OFFICE: 1949

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,339

JUDITH COPLON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 10,801

JUDITH COPLON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND MODIFICATION OF JUDGMENT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JUN 14 1951
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDITH COPLON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 10,339
JUDITH COPLON, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 10,801

PETITION FOR REHEARING AND MODIFICATION OF JUDGMENT

Appellant respectfully petitions the Court for rehearing and modification of its judgment of June 1, 1951, as follows:

1. For rehearing on the issue of the legality of arrest and for a judgment dismissing the indictment or, in the alternative, reversing the District Court's judgment of conviction and directing a new trial at which the Government will be required to prove likelihood of escape in accordance with the procedure set forth in *United States* v. *Coplon*, 185 F. 2d 629 (C. A. 2d, Dec. 5, 1950).

2. Alternatively, for modification of the judgment so as to order a new trial without a preliminary hearing in the District Court.

3. For the vacation of the judgment in No. 10,339 affirming the judgment of conviction, pending the District Court's decision on the appellant's motion for a new trial in the hearing prescribed by this Court's judgment.

The detailed grounds of this petition are set forth below:

POINT I

This Court's decision that FBI agents have powers of arrest beyond those set forth in Title 18 U. S. C. § 3052 is shown by further research to be contrary to the historical position and administrative interpretation of the Department of Justice.

This Court, in holding that the arrest was legal, failed to follow the decision of the Court of Appeals for the Second Circuit in *United States* v. *Coplon*, 185 F. 2d 629, involving the identical arrest. This Court held that in addition to the statutory powers of arrest given to the FBI by Title 18 U. S. C. § 3052, it also possessed the power of private citizens to make arrests. The Court further assumed that in the present situation a private citizen could have lawfully arrested appellant. It thereupon concluded that a similar power existed in and was exercised by the FBI, notwithstanding the express language of the statute.

A

Since the argument of these appeals, appellant's counsel have discovered what they believe to be conclusive historical material on the subject. This consists of admissions by the Department of Justice and the Federal Bureau of Investigation made during the last two decades in reports to Congress and elsewhere that until the passage

of Title 18 U. S. C. § 3052 (and its predecessor, Title 5 U. S. C. § 300(a)), FBI agents were completely devoid of the power of arrest. The following represent the most important of these admissions:

1. In 1933 Attorney General Mitchell stated:

> "My Bureau of Investigation does not make arrests; they turn the cases over to the marshals for arrest, or issue the warrant." (House Committee on Appropriations, 72d Cong., 2d Sess., pp. 305-6, Hearings on Dept. of Justice Appropriation Bill for 1934.)

2. In 1934, following the passage of Title 5 U. S. C. § 300(a), J. Edgar Hoover, the Bureau's Director, delivered an address on "Detection and Apprehension" at the Attorney General's Conference on Crime, in which he stated:

> "Perhaps it may surprise you to know that until these laws were passed, the Special Agents of the FBI had no power to make arrests." (Proceedings of the Attorney General's Conference on Crime, p. 28, Washington, 1935.)

3. On April 11, 1936, Mr. Hoover testified before a Congressional committee as follows:

> "Sen. McKellar [on Hoover's own experiences]: Did you ever make an arrest?
> Mr. Hoover: No, sir; I have made investigations.
> * * * * * *
> Sen. McKellar: Did you make the arrests?
> Mr. Hoover: The arrests were made by the immigration officers under our supervision.
> Sen. McKellar: I am talking about the actual arrests.
> Mr. Hoover: We did not have the power of arrest.
> Sen. McKellar: You never arrested them, actually?
> Mr. Hoover: We had no power to arrest until a year ago, when you passed a law giving us that power. Arrests, prior to that time, had to be made by the United States marshal or other officer." (Senate Com-

mittee on Appropriations, 74th Cong., 2d Sess., 1936, Subcommittee Hearings on Departments of State, Justice, Commerce and Labor Appropriation Bill for 1937, p. 199.)

4. In 1937 Attorney General Cummings wrote the following with respect to the powers of the FBI as they existed prior to the 1934 statute:

> "The special agents were purely investigative officers, exercising their function in aid of executive officers of the United States. Another quarter century was to pass before they were permitted to carry arms, serve warrants and subpoenas, or make seizures and arrests—powers recommended since 1910 and granted in 1934 to cope with the new criminal 'gangster' and 'racketeer'."
>
> Cummings and MacFarland, *Federal Justice, Chapters in the History of Justice and the Federal Executive* (New York, 1937), pp. 380, 381.

The foregoing material shows conclusively that our construction of the statute was correct.

It is not necessary at this point to explain why the FBI's powers were limited. It is sufficient to note, in the words of Attorney General Cummings, that: "An investigative agency under the direction of the chief law officer of a great nation was something new in Anglo-American Government" (*supra*, at p. 380). Congress for many reasons was fearful of giving any power to this agency (*U. S.* v. *Coplon*, 185 F. 2d at 635; Senator McKellar at 78 Cong. Rec. 445). Thus it was that many powers which were possessed either by other Government employees or by private citizens were denied the FBI. In 1910 the Attorney General reported that "Special Agents have no power to execute process" (Annual Report of the Attorney General for the year ending June 30, 1910, p. 76). In 1934 Mr. Hoover stated that "they were not endowed by law with the right to carry arms by which they could defend themselves" (Proceedings of the Attorney General's Conference on Crime, *supra*, p.

28). It was not until 1934 that the FBI actually became a law enforcement body. As the Attorney General stated on January 3, 1938:

> "This substantive legislation gave rise to problems of administration and enforcement. The Federal Bureau of Investigation of the Department of Justice is no longer a purely investigative unit; it is a law enforcement agency. Authority was sought and granted by the Congress to the personnel of the Bureau to make arrests and carry arms—an essential function which, surprisingly enough, had been previously lacking." (Annual Report of the Attorney General for the fiscal year 1937, pp. 6-7.)

Even then, it was expressly denied the broad powers of United States marshals (H. Rep. No. 1824, 73d Cong., 2d Sess.).

B

This Court cited *U. S.* v. *DiRe,* 332 U. S. 581 (1948), for the proposition that the state law of arrest governs where there is no applicable federal law. We believe that this Court, in so doing, overlooked the Supreme Court's express reference to Title 5 U. S. C. § 300(a) as an example of an applicable federal law. The Court stated that "Federal Bureau of Investigation officers are authorized *only* * * * " to make arrests pursuant to the provisions of Title 5 U. S. C. § 300(a), which was quoted in full (p. 590) (italics supplied). The Supreme Court also noted the greater arrest power of marshals (id.).

We believe too that this Court overlooked the decision of the Court of Appeals for the Second Circuit in *In re Fried,* 161 F. 2d 453, where it was expressly held that the statute now under consideration placed limitations upon the FBI's arrest powers. Circuit Judge Frank stated:

> "The privileges and immunities of citizens created by the Fourth and Fifth Amendments to the Constitution undoubtedly, at times impede the apprehension

and conviction of criminals. Further obstacles of that kind have been erected by the F.B.I. statute, 5 U. S. C. A. § 300a, which, by imposing limits on the investigatory methods lawfully available to the F.B.I. extends the citizens' immunities. Since Congress is the constitutional agency empowered to create such new immunities by enacting statutes, I think the restrictions put on official behavior by that statute deserve as much respect from the courts as the constitutionally-imposed restrictions" (pp. 460-461).

C

This Court adopted an argument of the Government first made in its supplemental brief after the Court of Appeals for the Second Circuit had ruled that there was no "likelihood of escape". At all times prior thereto the Government had repeatedly admitted that it was required to prove "likelihood of escape". Its brief in No. 10,339 states:

> "If the arrest is made without a warrant, the only requisites for validity are that the arresting agent have reasonable grounds for believing that the subject is guilty of a felony, cognizable under the laws of the United States, and that there be a likelihood of escape before a warrant can be obtained" (Appellee's Brief, p. 28).

It stated further that

> "* * * the arrest was made under 18 U. S. C., Sec. 3052, requiring probable cause and also likelihood of escape to justify arrest without a warrant by an FBI agent * * *" (id., p. 27).

To the same effect, see Appellee's Brief in No. 10,339 at p. 28, fn. 9, and pp. 29, 34, 36.[1]

[1] Point III-A of Appellee's Brief reads: "The arrest was lawful because the arresting officer had reasonable grounds for believing appellant to be guilty of a felony and the likelihood of escape existed" (p. 29).

The Government took the same position in its brief in the Second Circuit. Point III-B of that brief is entitled "Appellant's arrest was lawful because the arresting officer had reasonable grounds for believing her guilty of a felony, and the likelihood of escape existed" (p. 42). The Government again recognized the applicability of Section 3052 by stating, "Since it is evident that probable cause existed in the instant case, we turn now to the provision of 18 U. S. C. § 3052 that there be also a likelihood of the suspect's escaping before a warrant of arrest can be obtained" (p. 43). (See also the discussion following at pp. 43-48.)

This view that the statute constitutes the sole authority for an arrest by an FBI agent was also the view of the two District Judges who took testimony with respect to the validity of the arrest. In this case, No. 10,339, United States District Judge Reeves was of the opinion that the statute applied; his decision is predicated upon that view (Transcript, 5011-5015). In the New York case District Judge Ryan's opinion likewise recognized that the statute was applicable and that the sole source of FBI power to arrest is found in that statute. *United States* v. *Coplon,* 89 F. Supp. 142.

The same view is held by the United States Court of Appeals for the Third Circuit. In *U. S.* v. *Bianco,* C. A. 3d, No. 10,365, decided May 4, 1951, the validity of an arrest and concomitant search and seizure of a defendant engaged at the time of the arrest in the interstate transmission of lottery materials, 18 U. S. C. § 1301, was upheld by the Court. Its determination that the arrest was lawful was based exclusively upon the statutory standard. As it said:

> "The issue before us is whether the arrest of Bianco was lawful under Section 3052 of the Criminal Code, 18 U. S. C. § 3052 (Supp. 1950); 62 Stat. 817 (1948)" (p. 2).

It expressly held that it "must further determine whether there was a likelihood of his escape before a warrant for

his arrest could be obtained" (p. 5). Its decision against Bianco was based upon agreement with the District Court "that reasonable grounds for anticipating escape existed." [1]

D

This Court's opinion, we believe, likewise overlooks the legislative history of Title 5, § 300(a), fails to consider it in the setting of arrest powers of other federal employees, and inaccurately reads the legislative history of the most recent amendment to the statute under consideration. We indicate this briefly:

Our construction of the statute as an all-inclusive statement of FBI powers follows, of course, its precise reading. The words "that the person so arrested is guilty of such felony" refer to past crimes as well as present. The words of the prior statute, 5 U. S. C. § 300(a), "which have been committed", are also comprehensive enough to include crimes committed immediately preceding the arrest and those committed long before the arrest.

In holding that Title 18 § 3052 is not the sole source of the arrest power for FBI agents, this Court has overlooked the Attorney General's statement to the House Committee on the Judiciary in May, 1934, that FBI agents were handicapped "by reason of the failure of the law empowering them to make arrests" (H. Rep. No. 1824, 73d Cong., 2d Sess.), and his express disavowal of the suggestion "that our agents be given the powers of United States marshals."

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[1] This was the opinion also of the United States Attorney (Appellant's Brief, p. 5).

The District Court recognized that Title 18 § 3052 was the only source of FBI arrest power (Appendix to Appellant's Brief, p. 78a). The same position was taken by the United States Attorneys in *Suhay* v. *U. S.*, 95 F. 2d 890 (C. A. 10th, 1938) (Appellee's Brief, pp. 3, 7, 55) and in *Barrett* v. *U. S.*, 82 F. 2d 528 (C. A. 7th, 1936) (Appellee's Brief, pp. 4, 34, 50), where it was admitted that "* * * it was necessary for the Government to prove that there was a likelihood of the defendant escaping * * * before they could obtain a warrant for his arrest * * *."

As he said: "It seems to me that went further than was necessary. I did not want to ask for powers as broad as that" (*id.*).

The view of this Court that Section 3052 is only a partial statement of FBI arrest powers is inconsistent with the other provisions of Chapter 203 of Title 18 governing the arrest powers of other Government employees. We refer specifically to Section 3053 giving marshals the express right to make arrests without warrant "for any offense against the United States committed in their presence" and to Section 3050 relating to the powers of Bureau of Prisons employees. If it were intended that these employees possess state powers of arrest as well, much of the language of these sections is superfluous. Further, if it were intended that offenses committed in the presence of an FBI agent be a ground for arrest absent likelihood of escape, why should Congress have left out such a provision in Section 3052 when it inserted it in Section 3053? We believe that the Attorney General meant what he said in the quotation next above set forth.

This Court was evidently of the opinion that the 1950 amendment to Section 3052 supported its interpretation. The legislative history is to the contrary. Senator McCarran, supporting the Department of Justice's proposed amendment, stated to the Congress:

> "Mr. President, at the present time personnel of the Federal Bureau of Investigation may not make arrests without a warrant for misdemeanor committed in their presence and may not make arrests for felonies unless they have reasonable grounds to believe that the person arrested is guilty of such felony and that there is a likelihood of his escaping before a warrant can be obtained." (96 Cong. Rec., 14879, Sept. 13, 1950.)

The view of the Department of Justice prior to the Second Circuit decision was that Section 3052 was the sole source of arrest power (Sen. Rep. No. 2464, 81st Cong., 2d

Sess.). Neither in the Senate nor the House was it ever suggested that FBI agents had state powers of arrest. The proceedings in the House which followed the Second Circuit's decision did not suggest any disagreement with its statement of the law (96 Cong. Rec. 17109, Dec. 21, 1950; H. Rep. No. 3228, 81st Cong., 2d Sess.).

E

After assuming that FBI agents have the arrest powers of private citizens, this Court concluded that such a power was exercised in the present case. But the arrest was made by federal agents acting in that capacity, and upon information which no private citizen could have possessed. Their action, if illegal in their official capacity, cannot be justified by divorcing them from their official positions once they received the official information upon which they acted.

The second erroneous assumption, we submit, is that as private citizens they would have the right to make the search and seizure. The contrary is, of course, true. *Application of Fried,* 68 F. Supp. 961, 964 (S. D. N. Y., 1946), rev'd on other grounds *sub nom. In re Fried,* 161 F. 2d 453 (C. A. 2d, 1947), where it was stated that "a private person could in no event make a search incidental to an arrest".

In view of the foregoing, and particularly the Government's admissions as to the limitations upon FBI arrest power, appellant now seeks a reversal of the judgment in No. 10,339 affirming the judgment of conviction. In such event, we believe that the indictment should be dismissed because the evidence clearly shows that there was no likelihood of escape, a fact implicit in this Court's opinion and expressly decided by the Court of Appeals for the Second Circuit. However, in the alternative, this Court may prefer to follow the procedure established by the latter Court, *i.e.,* of remanding the case to the District Court for a new trial at which the Government may endeavor to prove likelihood of escape.

POINT II

This Court's judgment should be modified so as to order a new trial in No. 10801 without any preliminary hearing before the District Court.

This Court held that "the District Court erred in not affording a hearing as to the appellant's allegations that the Government listened through a wiretapping device to her telephone conversations with her attorney before the trial and while it was going on. The order denying the motion for a new trial will be set aside, as far as that ground is concerned, and the case will be remanded for a hearing to determine whether the alleged interceptions actually occurred. If so, the District Court should award a new trial at which the accused can be free of surreptitious interceptions of her telephone conversations with her counsel, and can enjoy the right of his effective assistance which is guaranteed by the Constitution" (p. 13).

The appellant requests a modification of this Court's judgment so as to direct a new trial without any intervening hearing before the District Court.[1] The reasons for this modification are as follows:

There can and, we assume, will be no dispute with the Government as to the fact that conversations between appellant and her counsel were wiretapped before and during the Washington trial. The record in No. 10,801, of course, contains sworn allegations by counsel that such wiretapping occurred (Appendix to Appellant's Brief in No. 10,801, pp. 13, 19, 59). These allegations were never denied by the Government in its responsive papers.

The record in Case No. 10,801 contains the admission of the FBI agent in charge of the investigation that there

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[1] Appellant does not abandon any grounds apparent of record or already briefed. In seeking to eliminate the preliminary hearing she of course does not waive her right to a dismissal of the indictment and her right to object to further proceedings.

was wiretapping of conversations between appellant and her counsel. Thus, we refer this Court to the New York testimony of FBI agent T. Scott Miller, incorporated in this record as follows:

> "* * * I recall that about March 20 or 21 or somewhere in that neighborhood, she conversed with Mr. Palmer, who at that time—that was the first time that he came in on the scene——
>
> Q. Is it this Mr. Palmer? A. Mr. Archibald Palmer, that is correct.
>
> Mr. Palmer: Thank you.
>
> The Witness: And for the remainder of the month there were various conversations concerning the possibility of Miss Coplon being arrested the second time; that is, an arrest on the basis of the Washington indictment.
>
> Q. When was that Washington indictment?
>
> The Court: Please, please, let him answer and then you can question him. Go ahead. Continue with your answer.
>
> The Witness: I recall a telephone call about two or three days before her father died, when she talked with a fellow by the name of Sid, and asked Sid to come over and pick her up and take her out. Then I think it was March 28th or March 29th she called you in the morning and told you that her father had died during the night.
>
> Q. When you say 'you', will you, for the record say Archibald Palmer. A. Archibald Palmer, I am sorry. I recall there were several calls pertaining to your obtaining permission from the Court for Miss Coplon to attend the funeral of her father, which was to be held in New Jersey. Then I recall a series of conversations which she had with you——
>
> Q. Will you say 'with Mr. Palmer' because the record won't show. A. With Mr. Palmer, which was also in the latter part of March, wherein she was making arrangements for her brother to go to Washington and clear the material out of her apartment, and also her office" (Appendix to Appellant's Brief in No. 10,801, pp. 16-17).

We note from the Government's motion of December 27, 1950, in this Court that copies of our briefs in the Second Circuit have been furnished to this Court. We respectfully refer this Court, therefore, to Appendix B of our reply brief in the Second Circuit, entitled "Examples of conversations between appellant and her counsel with respect to trial preparation and related matters in New York and Washington". Our brief contains the following reference to and partial quotation from the wiretap records in the impounded court exhibits:

> *"Court Exhibit 1-C.*
>
> This exhibit contains summaries of conversations between appellant and her counsel or relating to them, *inter alia,* between March 5, 1949 and May 2, 1949. In a conversation with appellant's brother, counsel stated that he and appellant had 'had a long conversation about your mother and we came to the conclusion we weren't going to bother with your mother because as long as your mother can't be a witness * * *' (p. 19). Reference was also made to other persons in Washington who might or might not be subpoenaed (p. 20).
>
> On April 19, 1949 there was another conversation between appellant and her counsel with respect to his desire that she testify (p. 32)."

We are certain, in view of the foregoing, that the Government will admit now to this Court, as we believe it did upon the oral argument, that it wiretapped conversations between appellant and her counsel prior to and during the Washington trial. It would be appropriate therefore for this Court to amend its judgment in No. 10,801 by directing that the motion for the new trial be granted forthwith, without the need to engage in "a hearing on the motion for a new trial", for the following reasons:

(1) Many prolonged hearings and trials have already been held in these cases. It would be advantageous to the District Court and the parties to avoid another hearing for the development of facts whose existence must be conceded.

(2) Unless this Court provides presently and without conditions that a new trial be granted, appellant will be required to file a petition for certiorari with the United States Supreme Court, since (a) the judgment of conviction in No. 10,339 has been affirmed; (b) the new trial is given appellant only upon proof of a single specified factor, *viz.*, wiretapping of conversations between her and her counsel; (c) if by any chance the District Court were to disregard the evidence appearing in pages 16-17 of the Appendix in No. 10,801 and like evidence now impounded in New York, appellant would have waived her right to petition for certiorari in No. 10,339 and her grounds for a petition in No. 10,801 except that of wiretapping counsel-client conversations.

POINT III

In any event, this Court should vacate its judgment affirming the conviction in No. 10,339 until after the District Court's order deciding the motion for a new trial in No. 10,801.

In the event that this Court should not grant the relief sought under Points I and II, the appellant will be compelled to file a petition for certiorari with the United States Supreme Court. Such a requirement would be unduly onerous to appellant. For undoubtedly a new trial will be held in this case after the hearing provided for in this Court's judgment of June 1st. Thus after appellant has filed a petition for certiorari and the Government has filed a memorandum on the subject, the petition will have to be withdrawn or will be denied on the ground that it is premature or moot (see, *e.g., Southern Pacific Co.* v. *U. S.*, 270 U. S. 103 (1926)).

Appellant is in straitened circumstances; her appeal to the Second Circuit was taken in *forma pauperis*. She can ill afford the filing of a petition for certiorari, and

under the circumstances of its prospective denial because of prematurity or mootness, it is equitable that such a requirement not be imposed. Nor do we believe that the Supreme Court or the Government should be burdened with the need for consideration of the matter under the circumstances of this case.

Secondly, this Court has held that it will not decide or even hear an appeal while a motion for a new trial is pending before it. *U. S. ex rel. Dascomb* v. *Board of Tax Appeals,* 56 App. D. C. 392, 16 F. 2d 337 (1926). Hence this Court, in its orders of April 26, 1950 and June 7, 1950, deferred argument upon the appeal in No. 10,339 while the motion for a new trial was pending in the District Court.

Accordingly, we believe it appropriate that the section of the judgment relating to No. 10,339 be vacated until disposition of the motion for the new trial in No. 10,801. This will be in accordance with the policy of this Court with respect to the relation between appeals and motions for new trial. It will also avoid the need for appellant to file a petition for certiorari with the Supreme Court in order to preserve her rights.

CONCLUSION

The petition for rehearing and for modification of judgment should be granted. The newly discovered historical materials with respect to FBI powers of arrest will, we believe, lead this Court to a different construction of Title 18 U. S. C. § 3052 and one in accordance with that of the Second and Third Circuits.

Secondly, the direction of a new trial without further hearing will facilitate procedural and related problems and be in accordance with the proof now before this Court. Undoubtedly, in this respect this Court overlooked the dates of the wiretapping admitted by the FBI and set forth in the Appendix to Appellant's Brief in No. 10,801.

Finally, it is submitted that in any event, the judgment affirming the conviction should be vacated pending determination of the motion for a new trial, so as to avoid the need for a premature petition for certiorari.

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Certificate of Good Faith

I certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

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Counsel for Appellant.

No. 10801

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDITH COPLON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

395

BRIEF FOR APPELLEE ON APPEAL FROM ORDER DENYING MOTION FOR A NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE

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United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 24 1950

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STATEMENT OF QUESTIONS PRESENTED

I

Whether the government's case against appellant was based upon evidence obtained by or as a result of intercepting telephone communications.

II

Whether appellant was prejudiced by the refusal of the court below to permit her to explore the existence of wiretapping so that such issue was not litigated therein.

III

Whether the issues of appellant's likelihood of escape within the meaning of the FBI arrest statute, 18 U. S. C. § 3052, and of the alleged different theories upon which the New York indictment against appellant and the indictment in the court below were based, constitute newly discovered evidence.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10801

JUDITH COPLON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE ON APPEAL FROM ORDER DENYING MOTION FOR A NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, denying appellant's motion for a new trial on the ground of newly discovered evidence, is reported at 91 F. Supp. 867.

COUNTERSTATEMENT

On April 17, 1950, after appellant's conviction but within the 2-year time limit fixed by Rule 33 of the Federal Rules of Criminal Procedure, appellant filed in the court below a motion for a new trial on the ground of newly discovered evidence. In substance, the motion alleged that subsequent to her conviction she learned that telephone conversations to which she was a party, as well as mail addressed to her, had been intercepted by agents of the Federal Bureau of Investigation.

Judge Albert L. Reeves of the Western District of Missouri, who as a visiting judge presided at the trial, returned to the court below to hear the motion. The hearing was held on June 22, 1950, at which time the judge heard argument of counsel for both sides and adjourned the case over the ensuing weekend to consider whether he would decide the motion or take testimony (NTr. 1–150).[1] On Monday, June 26, 1950, he overruled the motion (NTr. 242) and filed a written opinion (NTr. 235–241), reported at 91 F. Supp. 867, holding that (p. 872):

> The affidavits submitted by the parties, together with their briefs, have been examined and studied. I find no conflict of facts; neither do I find any conflict of the law and I find from the evidence submitted and from the records that the evidence upon which plaintiff was convicted did not stem from nor was it traceable to wiretapping, and, being untainted under the doctrine of the Nardone and Weiss cases, said motion should be overruled, and it will be so ordered.[2]

As this Court, of course, is aware, appellant was also indicted in the United States District Court for the Southern District of New York, together with a co-defendant, one Valentine A. Gubitchev, for conspiracy to defraud the United States and to violate 18 U. S. C. §§ 793, 794 (the espionage statutes) and 2071, and for substantive offenses of attempted espionage. See

---

[1] The record in this Court pertaining to the appeal from the order denying the motion for a new trial is, like the record in the main appeal, in typewritten form. In our principal brief we used the symbol "Tr" when citing record references. To distinguish the transcript relating to the proceedings on the motion for a new trial from the transcript on the main appeal we will refer to it as "NTr", and will continue to use the symbol "Tr" when citing the main record. References to the Appendix to appellant's brief on the new trial issue will be cited as "App. Appendix, p. —."

[2] By orders of this Court dated April 26 and June 7, 1950, argument of the main appeal (which was set for April 28 and then for June 15, 1950) was postponed. The first order provided that if the motion in the court below for a new trial on the ground of newly discovered evidence was denied and an appeal taken therefrom, the latter would be consolidated with the main appeal and would be heard at the same time (on June 15) on the stenographic transcript and typewritten briefs. The second order, entered when the hearing on the motion was set for June 22, postponed argument on the appeal until after action by the court below.

United States v. *Coplon,* 88 F. Supp. 910; *United States* v. *Coplon,* 88 F. Supp. 912; *United States* v. *Coplon,* 88 F. Supp. 921; *United States* v. *Coplon,* 89 F. Supp. 142. Her appeal from the judgment of that district court entered March 9, 1950, sentencing her to five years' imprisonment on her conviction under the conspiracy count and to fifteen years imprisonment on her conviction under a substantive count charging that she attempted to transmit documents relating to the national defense to a citizen and subject of the Union of Soviet Socialist Republics in violation of 18 U. S. C. § 794,[3] was argued before the United States Court of Appeals for the Second Circuit on November 2, 1950.

The New York indictment and trial (although different statutes and different portions of 18 U. S. C. § 793 were involved) were based upon the same arrest as that involved in the instant case. Respecting the issue involved in the motion for a new trial in the court below—wiretapping—the New York District Court held a lengthy pretrial hearing, from December 12, 1949, to January 20, 1950 (App. Appendix, p. 28), to ascertain the scope and extent of the government's wiretapping activities. It found as a fact that the following telephone interceptions were installed and maintained by agents of the FBI (see *United States* v. *Coplon,* 88 F. Supp. 921, 924–925):

> (a) Coplon residence—3685 38th St. NW., Washington, D. C. (referred to as the McLean Garden apartments), telephone no. Woodley 5219, installed January 6, 1949, continuously maintained until March 19, 1949;
>
> (b) Coplon office—Room 2220, Department of Justice Building, Washington, D. C., telephone no. Republic 8200, ext. 163, installed January 25, 1949, continuously maintained until March 12, 1949;
>
> (c) Coplon family residence—178 Ocean Parkway, Brooklyn, N. Y. C., telephone nos. Gedney 8–1048 and Ulster 3–6417, installed February 1, 1949, maintained until May 2, 1949, reinstalled on July 12, 1949, and continuously maintained until November 10, 1949;

[3] These sentences were ordered to run concurrently with each other but not concurrently with any sentence imposed upon appellant by another court.

(d) Gubitchev residence—64 W. 108th St., N. Y. C., telephone no. Academy 2–5823, installed February 1, 1949, continuously maintained until September 27, 1949.

In directing that all records, etc., made from the above interceptions be suppressed, as well as all evidence obtained as a result or use thereof except as that evidence was "demonstrated * * * to spring also from independent sources," the New York District Court denied appellant's motion to dismiss the New York indictment as founded on evidence illegally obtained. See 88 F. Supp., p. 931.

SUMMARY OF ARGUMENT

I

A. The legal principles applicable to the interception and divulgence of communications by investigative officers are well settled. Section 605 of the Federal Communications Act, 47 U. S. C. § 605, makes inadmissible in the federal courts evidence obtained by intercepting either *interstate* or *intrastate* telephone communications. *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321. Neither may leads be secured by wiretapping, but the fact that wires were tapped does not vitiate a criminal prosecution if the Government can establish to the court's satisfaction that its proof at the trial had an origin independent of wiretapping. *Nardone* v. *United States,* 308 U. S. 338

B. On the instant motion for a new trial the Government's evidence was clearly shown, with a single exception, to have been testimony of eye witnesses who actually observed appellant's movements, of witnesses who had direct conversations with appellant, and of witnesses who examined the documents seized from appellant at the time of her arrest, examined official records of the Department of Justice, or established the fact of her employment in that Department. The only exception was information that appellant was going to New York City on January 14, February 18, and March 4, 1949, but this information was also received from appellant herself, as the record shows, as well as by wiretapping. The record does not show

that the original investigation of appellant was commenced as a result of information secured by intercepting telephone communications, and the documents seized from appellant at the time of her arrest neither relate to appellant nor were shown to contain information obtained by wiretapping.

II

Appellant was not prejudiced by the refusal of the court below to permit her to explore the existence of wiretapping, and it is evident that appellant's questions to which the government objected were obviously ones which the court below properly refused to allow the witnesses to answer.

Appellant was not deprived of her right to the effective assistance of counsel because some of the intercepted communications were between her and her attorney, for the reason that no information obtained from such intercepted communications was used against her in the trial. Neither was appellant prejudiced by reason of her inability to litigate the wiretapping issue in the court below. In the absence of a proper attempt on the part of appellant "in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed," *Nardone* v. *United States,* 308 U. S. 338, 341, appellant had no right to litigate such issue in the trial, particularly since she did not raise it in advance thereof (*Nardone* v. *United States, supra,* p. 342) although her own testimony at the trial disclosed that she was suspicious that her wires might have been tapped (see App. Appendix, p. 40, Br. 11, Tr. 6983–6984). As to litigating such issue on the motion for a new trial, appellant was not deprived of any right to examine witnesses; there is no attempt to show that there are any additional witnesses beyond those whom she examined extensively in the United States District Court for the Southern District of New York. As the court below observed (91 F. Supp., p. 871), it would be futile again to go over the testimony which these witnesses gave in the hearings on the wiretapping issue in the New York District Court.

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III

A. The court below would not have been justified in the exercise of its sound judicial discretion in granting a new trial. While newly discovered evidence, as appellant states (App. Appendix, p. 22), may not be limited directly to facts relating to the commission of the substantive offense charged, nevertheless a new trial should not be granted unless the newly discovered evidence is of such nature that it would probably bring about a different result. *Heald* v. *United States,* 175 F. 2d 878 (CA 10). Discovery, subsequent to trial, of the fact that there was wiretapping is not of itself a matter of such nature, absent any showing that evidence so obtained, or leads therefrom, were used during the trial.

B. Developments during the proceedings in the New York District Court, allegedly bearing on the questions whether there was a likelihood of escape within the meaning of the FBI arrest statute (18 U. S. C. § 3052) when appellant was arrested without a warrant, and whether Count II of the New York indictment (on which appellant was acquitted) charged that she was lawfully in possession of the material seized from her person while the prosecution in the court below proceeded on the theory that her possession of the material was unlawful, do not constitute newly discovered evidence. The legality of the arrest is a question involved in the main appeal. The alleged concession of the government to which appellant alludes—a statement made in a legal memorandum in the New York District Court that appellant might have been arrested later on—is of course not newly discovered evidence. Neither is the so-called question whether the New York and Washington indictments, charging different offenses in the language of separate and distinct statutory provisions, were based upon different theories as to appellant's possession of the documents seized from her person. The two cases have no relationship to each other in this respect. The theory on which appellant was prosecuted in New York could have no conceivable bearing on her conviction under a different indictment in the court below.

ARGUMENT

I

The Government's case was not based upon evidence obtained by or as a result of intercepting telephone communications

Appellant contends that she was deprived of a fair trial because evidence obtained by wiretapping was used against her.[4] We will first discuss the law respecting interception and divulgence of telephone communications, and then the application thereof to the instant case.

A. The law respecting admissibility of evidence obtained by intercepting telephone communications

The applicable legal principles are simple and well settled. In 1934 Congress enacted the Federal Communications Act, Section 605 of which (47 U. S. C. § 605) provides, so far as pertinent, that:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * *.[5]

In the first two cases involving Section 605 which reached the Supreme Court, that Court held that Congress had made inadmissible evidence obtained by wiretapping. The first, *Nardone* v. *United States,* 302 U. S. 379 (1937), held inadmissible evidence obtained by intercepting *interstate* telephone communications. The second, *Weiss* v. *United States,* 308 U. S. 321 (1939), applied the same rule to intercepted *intrastate* telephone communications.

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[4] See Br. 8–9.

[5] Prior to the enactment of the statute, the Supreme Court held by a 5–4 decision in *Olmstead* v. *United States,* 277 U. S. 438 (1928), that the obtaining of evidence by means of wiretapping, and its use against the defendant, does not infringe any right secured by the Fourth Amendment to the Constitution because wiretapping does not amount to a search and seizure; and that use of such evidence does not compel the accused to be a witness against himself in violation of the Fifth Amendment. This view was reaffirmed in 1942 in *Goldstein* v. *United States,* 316 U. S. 114, 120.

The third case, *Nardone* v. *United States,* 308 U. S. 338 (1939), commonly called the second *Nardone* case, arose from the re-trial and conviction of the same defendants involved in the first *Nardone* case, without using the wiretap evidence which the Supreme Court had held inadmissible. The trial judge had "refused to allow the accused to examine the prosecution as to the uses to which it had put the information" obtained by wiretapping (308 U. S. p. 339); and in reversing the Supreme Court held that, when the defendant in the first instance establishes to the court's satisfaction that wiretapping was employed, he must be given an opportunity "however closely confined" to prove that a substantial portion of the government's case was obtained by such methods (308 U. S. p. 341). However, the Court applied to cases involving Section 605 the rule which, under *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, applies to instances of cases of unreasonable search and seizure. It stated (308 U. S., p. 341) that "Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *.'" Hence a prosecution is not vitiated if the government can "convince the trial court that its proof had an independent origin" (308 U. S. p. 341). See also *United States* v. *Weiss,* 34 F. Supp. 99, 102 (S. D. N. Y.); *United States* v. *Coplon,* 88 F. Supp. 921, 927 (S. D. N. Y.).

Other cases involving the interception of telephone communications are not sufficiently analogous to warrant extended discussion here.[6] There is no dispute in the instant case that

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[6] Appellant seeks to create the impression that the tapping or wires *per se* means that her conviction cannot stand. However, both the Supreme Court and the Court of Appeals for the Second Circuit have affirmed convictions in cases where there was wiretapping but no infringement of the doctrine of the second *Nardone* case. *Goldstein* v. *United States,* 316 U. S. 114, where government witnesses were induced to testify by being confronted with transcripts of intercepted telephone communications to which they, but not the defendants, were parties; and *United States* v. *Seeman,* 115 F. (2d) 371 (C. A. 2), where appellant's wire was not tapped but messages over co-defendants' wires (not involving appellant) were intercepted.

This Court briefly alluded to the subject of wiretapping in *Billeci* v. *United States,* 85 App. D. C. ——, 184 F. 2d 394, decided August 2, 1950, but that issue was not actually there involved.

such communications were intercepted (see *supra,* pp. 3–4); the single limited issue is whether evidence so obtained, directly or derivatively, and not having "an independent origin," comprised "a substantial portion of the case against" appellant (308 U. S., p. 341). The United States District Court for the Southern District of New York, in the well-established range of judicial discretion vested in it (308 U. S., p. 342), resolved this issue against appellant (*United States* v. *Coplon,* 88 F. Supp. 921), and the court below concurred in that view. We may therefore turn to the application of the law to the instant case.

B. Application of the foregoing legal principles in the instant case

Applying the legal principles as discussed *supra,* both the court below and the United States District Court for the Southern District of New York decided that appellant's conviction did not rest upon any evidence obtained directly, or indirectly because of leads, from wiretapping. As the opinion of the New York District Court discloses, it held an extended hearing and allowed appellant and her co-defendant "considerable latitude—far more than would have been justified in the ordinary proceeding of this type"; the hearing resulted in "a full and complete disclosure to the defendants of all conversations, information and evidence secured by the government as a result of these interceptions"; and the court's "careful study of the information obtained on all these interceptions reveals that at no time was a conversation between defendants Coplon and Gubitchev intercepted; that at no time was either defendant heard to mention the name of the other; and that the existence of the alleged conspiracy was never discussed in the slightest manner." 88 F. Supp., pp. 926–927.

The government's evidence at the trial in the court below is summarized in the counter statement in our main brief at pp. 1–13. Twenty-four witnesses testified for the government, and their testimony was confined exclusively to the following matters: (1) the nature of appellant's duties as an employee of the Department of Justice; (2) the preparation of the so-called "decoy memorandum" (Govts. Ex. 13, Tr. 5058–5060); (3) the identity and nature of the documents found in appellant's purse and statements made by her in the presence of FBI

agents following her arrest; (4) conversations and transactions had by Department of Justice personnel directly with appellant; and (5) the actual observations of FBI agents who were eye witnesses to the movements of appellant and Gubitchev while they were being surveilled on January 14, February 18, and March 4, 1949. For convenience, we point out that our counter statement in the main brief shows that, in short, the following was the testimony of the government's witnesses:

1. NATHAN H. FRANKE (*Administrative Officer, Criminal Division, Department of Justice*): This witness testified solely with respect to appellant's employment status as disclosed by the records of the Department of Justice (Br. 1–2).

2. WILLIAM E. FOLEY (*Chief, Foreign Agents Registration Section and Internal Security Section, Criminal Division, Department of Justice*): Through the testimony of this witness, the government offered evidence solely as to *direct personal conversations and transactions* had between Foley and appellant, with respect to appellant's duties as an employee of the Department of Justice, and with respect to his connection with the so-called "decoy memorandum" (Br. 2–5).

3. RUTH M. ROSSON (*Attorney, Internal Security Section, Criminal Division, Department of Justice*): The testimony of this witness with respect to the appellant related exclusively to *direct conversations and transactions* with appellant (Br. 3).

4. ROBERT J. LAMPHERE (*Special Agent, FBI*): Through the testimony of this witness the government offered evidence solely related to his preparation and transmittal of the so-called "decoy memorandum," and to his comparison of each data slip with the FBI report in which the information contained in the former appeared (Br. 13).

5. COURTLAND J. JONES (*Special Agent, FBI*): The testimony of this witness related solely to his examination of certain official records in the files of the Department of Justice (Br. 13, Tr. 4905–4912).

6. LEO J. GAUTHIER (*Special Agent, FBI*): This witness testified solely to the preparation by him of certain maps and charts (Tr. 602 et seq., 1439 et seq., 4349 et seq.).

7. T. SCOTT MILLER, JR. (*Special Agent, FBI*): This witness testified concerning his examination of the contents of the appellant's purse and with respect to statements made by her following arrest (Br. 12). *The balance of his testimony related exclusively to what he observed as an eye witness* to the movements of the appellant and Gubitchev while they were under surveillance in New York City (Br. 5–12).

8 through 24. (*All Special Agents of the FBI*): *These seventeen witnesses testified exclusively to what they had respectively observed as eye witnesses* to the movements of the appellant and Gubitchev while they were under surveillance in New York City on January 14, February 18, and March 4, 1949 (Br. 5–12).

It is clear beyond doubt that, with one possible exception, none of the government's evidence could conceivably have stemmed in the slightest degree, directly or indirectly, from wiretapping. The exception, which received the careful consideration of both the court below and the New York District Court, was that the FBI learned by means of the wiretaps that appellant was going to New York on January 14, February 18 and March 4, 1949.

However, as both the court below (91 F. Supp., p. 869) and the New York District Court (88 F. Supp., p. 929) found, this information was also obtained from independent sources. Plainly the record of the trial of the instant case supports this finding of the court below. The testimony, both that of government witnesses and that of appellant herself, showed that she advised her superior in advance when she was going to New York. She testified that on the morning of March 4 she told her superior, witness Foley, that she was taking the one o'clock train to New York (Tr. 7219), while Foley testified to the same effect (Tr. 8016–8017). Similarly, according to the latter, she

advised him on the morning of February 18 that she was leaving on the one o'clock train for New York (Tr. 272). On two or three occasions beginning in mid-January 1949, March 4 being one of them, Foley, upon learning that appellant was making a trip to New York, advised the FBI thereof (Tr. 8017–8020). He did this on instructions from his superiors (Tr. 8017).

In addition, the government submitted at the hearing on the motion for a new trial the affidavits of six individuals, Foley, Clive W. Palmer, a special assistant to the Attorney General, and Leo L. Laughlin, Thomas A. Mendenhall, Kenneth T. Delavigne, and Howard B. Fletcher, personnel of the FBI (NTr. 228–234, App. Appendix 71–78). These affidavits state that within a day or two prior to the dates of January 14, February 18, and March 4, 1949, appellant personally advised Foley of her intention to go to New York and asked permission to leave work in order to catch an early afternoon train. On the January 14 occasion Foley advised Palmer who in turn transmitted the information to Laughlin. The latter told Delavigne that appellant was leaving for New York, and Delavigne instructed the New York field office of the Bureau to surveil appellant's movements. On both the February 18 and March 4 occasions Foley informed Fletcher, who instructed the New York office to surveil appellant's movements upon her arrival.

Clearly the court below correctly held (91 F. Supp., 869) that "the very fact that the government (if it be a fact and apparently it is) obtained the identical information wrongfully, would not destroy or taint evidence otherwise lawfully and properly acquired as the record disclosed in this case." [7]

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[7] On this question the New York District Court stated (88 F. Supp., p. 929):

"The government has established to my satisfaction that it is in possession of evidence of Coplon's trips to New York, distinct and wholly independent of any advance information of the contemplated trips gained through telephonic and microphonic interceptions. It has proof of 'tangible, physical actions separate and apart from what may have been said about them over the telephone', which is admissible. *United States* v. *Weiss*, D. C. S. D. N. Y. 34 F. Supp., 99."

C. The interception of telephone communications did not affect appellant's right to a fair trial by resulting in the use against her of evidence obtained by wiretapping

Appellant's argument (Pt. I, Br. 8–9) that she was deprived of her right to a fair trial by the introduction of evidence obtained by wiretapping rests on a false premise. She assumes that since the New York pre-trial hearing established that the original investigation of appellant was touched off by a "confidential informant", this necessarily means that such source was a "wire-tapper"; and that the New York trial judge made the same assumption when he withheld from defense counsel the FBI investigative reports in the Coplon-Gubitchev case. These assumptions are entirely unwarranted. The colloquy in the New York pre-trial hearing quoted at App. Appendix p. 34 at the most would indicate that Judge Ryan was making the assumption for purposes of argument. The nature of Judge Ryan's assumption is made clear by his written opinion, where he stated (88 F. Supp., pp. 928–929):

> Testimony of several agents of the Federal Bureau of Investigation established that the first information received which set them on the trail of the defendants came from a "confidential informant." Counsel attempted to show that the confidential informant was a wiretapper. The court sustained objections to all questions which sought the identity or character of the informant. This was done to prevent unnecessary probe into the confidential sources of information of the Bureau and since it has been settled that the government need not disclose the identity of informers unless it appears that disclosure is necessary or desirable to show defendant's innocence. *United States* v. *Li Fat Tong*, 2 Cir., 1945, 152 F. 2d 650; and cases there cited; 8 Wigmore on Evidence, 3d ed., Sec. 2374 (f). This necessity is not present here. Even if the informant were a wiretapper defendants did not thereby gain any immunity from prosecution for a subsequently committed crime. The unlawful interception of telephonic communications does not give the participants immunity

> as to all criminal enterprises planned or discussed, which are overheard by law enforcement officers. Plans and details of proposed criminal ventures so arranged may not be carried out and perfected with impunity, for no license or privilege to commit crime is conferred on wrongdoers by reason of the fact that the wires over which they talk are unlawfully tapped by agents.[8]

Appellant also argues under Point I (Br. 9) that the data slips (Govts. Exs. 90 (a)–111 (a) and Defts. Exs. 104–115), found in her purse at the time of her arrest, contained information obtained by wiretapping. However, those documents and the FBI reports from which their contents were taken speak for themselves.[9] As the court below said, "it did not appear that such data slips or the information contained therein had been obtained by wiretapping" (91 F. Supp., p. 870); but this is immaterial as far as appellant is concerned, since all the information therein contained referred to other persons and none of it referred to her. Cf. *Goldstein* v. *United States*, 316 U. S. 114; *United States* v. *Seeman*, 115 F. 2d 371 (CA 2).

II

Appellant was not prejudiced by the refusal of the court below to permit appellant to explore the existence of wiretapping

Appellant contends (Pt. II, Br. 10–13) that the government was guilty of prejudicial misconduct necessitating a new trial because it allegedly concealed the existence of wiretapping from

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[8] The New York District Court also pointed out that the testimony showed that on December 31, 1948, the FBI informed its Washington field office that a very important case would be assigned to it; that the necessity of surveilling appellant as a suspected espionage agent was discussed on January 3, 1949, and a field investigation instituted January 4; that physical surveillance of appellant was commenced at 5:25 P. M. January 6; and that the first wiretap (on appellant's apartment in Washington) was installed at 4:00 P. M. January 6, with the first interception being recorded three hours later at 6:57 P. M.

[9] For the convenience of this Court we have printed, as an Appendix to this brief, a table showing the pages where the texts of the data slips and corresponding FBI reports appear in the stenographic transcript of the trial. Copies of the data slips and other documents seized from appellant's person are on file with this Court.

appellant during the trial by objecting to her inquiry as a "fishing expedition", and by remaining silent when its witnesses testified that they were ignorant of wiretapping, testimony which she says the New York pretrial hearing showed to be perjurious. As additional misconduct appellant asserts that the government utilized in summation appellant's suspicion that her wire was being tapped to impress the jury with her consciousness of guilt, deprived her of her right to litigate the wiretapping issue in the court below and to examine the government's witnesses in respect thereto, and intercepted communications between her and her attorney.

By reference (Br. 10–12) to certain pages of appellant's Appendix, including page 5 (which contains other citations to pages of the trial testimony, namely "Tr. 2309, 2310, 2312, 2313, 3927, 3928, 6651 and 6652"), appellant sets out some of the testimony which she says was perjurious and the government's objections to which allegedly prevented her counsel from ascertaining the true facts.

The first of these instances (Tr. 2309–2310, 2312–2313) is her general request made during cross-examination of an FBI agent, that the government produce a log showing how many agents surveilled appellant, and "also a record, if there is such a record", of the tapping of telephones (Tr. 2309–2310). The prosecutor correctly characterized this as "purely a fishing expedition which requires no answer" (Tr. 2312).[10] When counsel repeated "I want to know the names of the people who did the tapping", the prosecutor accurately interposed: "Counsel is again suggesting things to be facts on his own statement without any proof of it" (Tr. 2313). Then followed the request that government counsel give their personal assurance that "the phones of these people" had not been tapped, which the trial court said was matter for discussion between counsel (Tr. 2313). In explaining why it subsequently sustained objections which

[10] In the trial in the court below one of government counsel, Mr. John M. Kelley, called by the defense, testified that he did not know from his study of the FBI investigative reports in the instant case that wiretapping had been practiced (Tr. 6611). In the pre-trial hearings in the New York District Court government counsel vigorously denied having any knowledge of the existence of wiretapping.

were "wholly immaterial" because not relating "to any evidence offered by the government or to any evidence of fact elicited on cross-examination," the court below stated (91 F. Supp., p. 871):

> If counsel * * * had challenged any evidence as having a possible origin in or being traceable to wiretapping, he would have been permitted to pursue the inquiry.

Again, during cross-examination of the arresting officer, Special Agent Granville, the following *general inquiry* was made by appellant's counsel: "Now, in connection with the activities of the FBI, from January 14 up to and including March 4, was there any activity in connection with the home of Miss Coplon or the place of business of her brother or anyone connected with her family in the form of tapping their telephones" (Tr. 3928). The court sustained an objection to this question, and the next question to the witness was:

> Q. Was there any tapping—I am going to try it the other way. It may be the form I put it in. At any time between January 14 and March 4, inclusive, to your knowledge, were any directions given by you to anyone or through you to anyone the tapping of the telephones of Miss Coplon or any member of her family, yes or no?
>
> A. No (Tr. 3928).

This question, as put to the witness, related only to the nature of the instructions, if any, which might have been given by or through him to Bureau personnel. There is not the slightest indication that Granville's negative answer, meaning that no such instructions were given by or through him, was untruthful.

Howard B. Fletcher, another employee of the FBI, was called as a witness by the defense (Tr. 6641). Appellant's counsel asked him first about mail covers by the FBI (Tr. 6651), and then "What is a tap?", to which the prosecutor objected because "There has been no testimony concerning one. There have been a lot of questions." (Tr. 6652). Thereafter the prosecutor's objections were sustained to two questions, phrased generally, about whether appellant's phones were ever

tapped (Tr. 6652–6653). As the trial court had previously sustained objections to general questions of this nature propounded during cross-examination of government witnesses, it was obviously correct in sustaining objections, at this late stage of the trial, to such questions propounded to a witness called by the defense.

Appellant's further assertion (Br. 12) that Agent Miller testified falsely, and that the government should have so advised the trial court, is equally without justification. Miller's testimony—he was on the stand intermittently (Tr. 27–125; 1026–1208; 2074–2119; 2124–2126; 2873–2903; 3074–3122; 4417–4781; 4787–4901)—discloses that he was asked no question regarding tapped telephones except the one appearing at Tr. 4528–4529. The question was, in substance, whether Miller knew, by reason of tapped telephones, dictaphones, or other investigative methods used by the FBI, whether Gubitchev had an appointment to meet appellant on the night of March 4, 1949. The government's objection to this question was sustained, and Miller was then permitted to answer "No" to a question merely asking whether he knew that Gubitchev had an appointment with appellant (Tr. 4529). As with the question answered by Agent Granville, there is not the slightest indication that this answer was not truthful.

Agent Brennan, mentioned at Br. 12, was asked, after the defense had made him its witness (Tr. 699), "Do you know whether or not there were any agents of the United States Government, the FBI, tapping the wires of her home?" He answered, "I have no knowledge of such" (Tr. 706). We cannot reconcile this answer with the testimony of this witness at the New York pretrial hearing, quoted at App. Appendix, pp. 42–43, that he first became acquainted with the fact that telephonic communications were intercepted in February (1949). However, the basic and only question involved here, as in the entire issue whether appellant's motion for a new trial should be granted, is whether evidence obtained by wiretapping, directly or derivatively and not having an independent origin, contributed to her conviction. Since, as we have demonstrated *supra*, pp. 10–12, no such evidence or information played any

part in her trial, it is plain that the incidents here under discussion do not avail appellant.

Significantly, appellant did not mention the issue of wire tapping until after the trial began, although, as she admits, (Br. 11, App. Appendix 40, Tr. 6983–6984), her own testimony at the trial disclosed that she was suspicious that her wires were being tapped.[11] As the Supreme Court said in the second *Nardone* case (308 U. S., p. 342), "if such a claim [that telephone communications were intercepted] is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim."

Equally unavailing is appellant's contention (Point II, Br. 11) that the telephone interceptions deprived her of the effective assistance of counsel because violative of the secrecy held essential to the relationship. In that connection the court below stated (91 F. Supp., p. 870):

> * * * while this may have been a serious breach of ethics, such conduct cannot be punished by granting a new trial unless such conduct was the means of procuring evidence to convict the defendant. Quite perfectly the old adage, "damnum absque injuria" (wrong without injury) would apply in the case.[12]

It is difficult to see how appellant has been 'affirmatively prejudiced" in any substantial sense, as she charges (Br. 13), by having lost her right to litigate the wiretapping issue in the court below. Her right to litigate such issue in the trial was dependent upon her establishing, in the first instance, "to the trial court's satisfaction that wiretapping was unlawfully em-

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[11] Appellant's suspicion that her wire was being tapped was her own statement (App. Appendix 40) and therefore could be legitimately used in summation.

[12] The New York District Court disposed of this contention as follows (88 F. Supp., p. 926):

"Conversations between this defendant and her attorney were intercepted on defendant's wire, but it is apparent that at such times they were suspicious their circuit was being tapped and consequently they refrained from discussing matters of any importance (at least as early as March 16, 1949, the attorney was heard on the telephone express his suspicions of this)."

ployed." *Nardone* v. *United States,* 308 U. S. 338, 341. This she did not do by any conceivable stretch of the imagination, particularly since she made no attempt to raise the issue in any way until the trial was in progress, a point at which an additional showing that "the accused could not at an earlier stage have had adequate knowledge of his claim" is necessary to warrant interfering with the orderly conduct of the proceedings. See *Nardone* v. *United States, supra,* at p. 342. And as to any right of appellant to litigate the issue of wiretapping on the motion for a new trial on the ground of newly discovered evidence, a thorough investigation into the question has been conducted in another court involving the same parties and the same facts. The government witnesses who participated therein have all been examined and subjected to most searching examination by appellant on the wiretapping issue. She points to no new or additional facts which could conceivably be developed; she points to no additional witnesses who could give material testimony. She has therefore lost no right to question any witnesses, since no useful purpose could be served by again going over the testimony which the witnesses gave in New York. That would be futile, as the court below observed. 91 F. Supp., p. 871.

The Supreme Court's condemnation in *Berger* v. *United States,* 295 U. S. 78, was directed not only to gross and intemperate misconduct in the language used in summation, but also to the prosecuting attorney's "improper suggestions, insinuations and, especially, assertions of personal knowledge" in cross-examining witnesses. Such procedure, the court held, is "apt to carry much weight against the accused" because of the impartiality required of and imputed to the United States Attorney, whose duty is not merely to secure a conviction but to see that justice is done. Even so, the Court stated at 295 U. S., p. 89:

> If the case against Berger had been strong, or as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached.

The decision of this Court in *Griffin* v. *United States,* 85 App. D. C. ——, 183 F. 2d 990, which involved the admissi-

bility in evidence of an "uncommunicated threat," merely requires "disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense." In the instant case no such evidence existed.

III

No showing has been made by appellant on which a new trial should be granted

A. Meaning of "newly discovered evidence"

It is thoroughly settled that to warrant the granting of a new trial on the ground of newly discovered evidence the following five requisites must exist: (1) discovery since the trial, (2) facts from which the court may infer diligence on the part of the movant, (3) the evidence must not be merely cumulative or impeaching, (4) the evidence must be material, and (5) the evidence must be such as would probably produce acquittal on a new trial.[13] No rule is better established than that the granting or refusal of a motion on such ground rests largely in the discretion of the trial court, the prime consideration being whether or not substantial justice was done, and in the absence of an abuse of discretion the appellate courts will not disturb the decision reached below.[14] It has been said that the courts listen distrustfully to the claim of newly discovered evidence, and as a ground for a new trial it is not favored.[15]

The government does not dispute appellant's statement (App. Appendix, p. 22) that newly discovered evidence "is not necessarily limited to the facts brought out at the trial relating to the substantive offense charged," to which she cites *United States* v. *Rakes,* 74 F. Supp. 645 (later affirmed 163

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[13] *Prisament* v. *United States*, 96 F. 2d 865 (C. A. 5); *Johnson* v. *United States*, 32 F. 2d 127 (C. A. 8); *Turner v. United States*, 14 F. 2d 360 (C. A. 8), *Weiss* v. *United States*, 122 F. 2d 675 (C. A. 5), *cert. den.* 314 U. S. 687.

[14] In addition to the cases cited in footnote 13, see *Roberts* v. *United States*, 137 F. 2d 412 (C. A. 4), *cert. den.* 320 U. S. 768; *Meredith* v. *United States*, 138 F. 2d 772 (C. A. 6), *Long* v. *United States*, 139 F. 2d 652 (C. A. 10); *Helwig* v. *United States*, 162 F. 2d 837 (C. A. 6).

[15] *Casey* v. *United States*, 20 F. 2d 752 (C. A. 9), aff'd 276 U. S. 413; *Thomas* v. *United States*, 27 F. 2d 1023 (C. A. 6).

F. 2d 771 (C. A. 4)). However, under recognized principles, that relief is not available to her "unless the newly discovered evidence is of such a nature that on the new trial it would probably bring about a different result." *Heald* v. *United States,* 175 F. 2d 878, 883 (C. A. 10), and cases cited therein. Discovery, subsequent to trial, of the fact that there was wire tapping is not of itself a matter of such nature, absent any showing that evidence so obtained, or leads therefrom, were used during the trial to bring about appellant's conviction.

The court below would not have been justified, in the exercise of its sound judicial discretion, in granting a new trial. It knew the evidence which the government had introduced at appellant's trial, and it knew that the New York District Court, after extensive hearings, had required a full and complete disclosure of the information obtained by wiretapping and had concluded that the case against appellant did not stem therefrom. There was no occasion for the court below to repeat those extended hearings. In the pretrial hearing in New York the district judge had no means of knowing in advance (except as disclosed by affidavits filed by the government) what evidence the government would seek to introduce at the prospective trial. It was therefore necessary, preliminarily, to ascertain what information the government obtained by intercepting telephone communications to the end that the court, during the course of the subsequent trial, would be in a position to suppress and exclude evidence so obtained. In the instant case, however, the government's proof was a matter of record and had been heard by the trial judge, who was to pass upon the motion for a new trial. All that was necessary for him to determine on the motion was whether or not a portion of that evidence consisted of, or was derived from, information secured by wiretapping. In other words, the New York District Court was examining unknown information which might be used in the future, while the judge of the court below was concerned only in the information which he had previously received in evidence

at the trial and with which he was hence familiar. Plainly he was correct in concluding that such information did not stem from wiretapping, and that consequently a new trial should not be granted.[16]

B. Alleged "admissions" of government during the New York trial

Appellant also contends that newly discovered evidence, requiring a new trial, resulted because (1) the revelation of the existence of wiretaps negates the likelihood that she would escape within the meaning of 18 U. S. C. § 3052 when she was arrested without a warrant (Br. 14) (see Point III, pp.

[16] The opinion of the New York District Court discloses that all the recordings and material relating to interceptions in Washington, D. C., were produced in court, but that the recordings and some of the material relating to interceptions in New York had been previously destroyed. 88 F. Supp., p. 926. The court found that most of these recordings were destroyed pursuant to the usual practice of so disposing of such material when 60 days or more old, and that the rest were destroyed pursuant to an FBI order dated November 7, 1949 (the so-called "Tiger" memorandum set forth at App. Appendix, p. 46) directing that the informant "Tiger," which had "been furnishing information concerning the activities of Coplon since her conviction" in the court below, be immediately discontinued and "all administrative records in the New York office covering the operations of this informant be destroyed" in "view of the imminency of her trial" in the New York District Court, because "pertinent data furnished by the informant has already been furnished in letter form" by the New York office, and "having in mind security, now and in the future."

The New York District Court described in detail what happened in this regard, found that the destruction was neither contemptuous nor intended to interfere with the administration of justice, and that "I find, too, that as a result of searches instituted at the order of the court sufficient evidence has been made available to establish all the material and relevant matters disclosed by these interceptions." 88 F. Supp., p. 926. Additionally, the only material ordered destroyed by the November 7 memorandum was that pertaining to the wiretap designated by the FBI under the code name "Tiger," the only one still being maintained on the date of the memorandum, which was the surveillance reinstalled on the Coplon residence in Brooklyn on July 12, 1949, after her conviction in the court below, and maintained until November 10, 1949 (see *supra*, pp. 3–4). Certainly no information obtained by means of that telephonic surveillance could have contributed to appellant's prosecution and conviction in the court below, which ended with the imposition of sentence on July 1, 1949, quite aside from the fact that it is entirely clear that none of the government's witnesses testified to information obtained by wiretapping and that the case did not stem therefrom (see *supra*, pp. 10–11).

27–34 of the government's main brief), (2) the government allegedly admitted in a legal memorandum filed in the New York District Court, in reply to appellant's motion to suppress evidence seized from her person at the time of the arrest, that she could have been arrested later on with a warrant (Br. 14–15), and (3) that the New York indictment was an admission that her possession of the data slips was "lawful" whereas she was prosecuted in the court below on the theory that her possession thereof was "unlawful" (Br. 16–17).

Respecting (1) and (2), it is clear that, as held by the court below (91 F. Supp., pp. 871–872), the legality of the arrest is not a question involved in the motion for a new trial on the ground of newly discovered evidence. It is one of the issues of the main appeal. We showed in Point III of our main brief that both probable cause and likelihood of escape existed when appellant was arrested in New York City at 9:35 p. m. on March 4, 1949. Obviously wiretapping could not have affected this issue, since no arrest could have been made had appellant not met Gubitchev that night.[17] Further, no element of the combination of activities on the part of appellant and Gubitchev that evening, all of which transpired under the agents' observation and the cumulation of which constituted the legal basis for the arrest without a warrant, was dependent upon or stemmed from wiretapping. See Counter Statement of our main brief, pp. 9–12. And certainly no statement made by the government for purposes of legal argument on a motion in the New York District Court could have any bearing on the factual situation with which the arresting officer was confronted, from the standpoint of either probable cause or likelihood of escape, when he made the arrest.

The short answer to appellant's argument respecting the so-called "admission" of lawful possession in the New York indictment is that different statutes were there involved and in any event the matter is of no moment here. The New York indictment is summarized in *United States* v. *Coplon*, 88 F. Supp. 910, 911, but the count to which appellant alludes is

[17] For example, had she gone directly to her parents' residence in Brooklyn when she arrived in New York that night.

Count 2, on which she was acquitted. It charged, in the language of the fourth paragraph of 18 U. S. C. § 793, that she attempted to transmit to her codefendant documents of which she was lawfully in possession. She asserts (Br. 16) that the copy of the indictment which was served upon her charged that her possession was "unlawful." Under paragraph four of § 793 it is wholly immaterial whether such possession was lawful or unlawful, for in either event it is equally an offense to transmit or attempt to transmit documents relating to the national defense to an unauthorized person. However, how this matter could have any bearing upon appellant's conviction in the court below for copying, taking, etc., documents in violation of the second paragraph of 18 U. S. C. § 793, and for unlawfully removing and concealing documents in violation of 18 U. S. C. § 2071, is impossible to comprehend.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the court below overruling the motion for a new trial on the ground of newly discovered evidence should be affirmed.

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APPENDIX

List of data slips and FBI reports

Data slips	Transcript page No.	Corresponding FBI report	Transcript page No.
Govt's Exhibit 90a	4805	Defendant's Exhibit 116	5722, 5771
" " 91a	4867	" " 117	5717, 5748
" " 92a	4808	" " 118	5716, 6200
" " 93a	4810	" " 119	5504
" " 94a	4847	" " 120	5720, 5754
" " 95a	4812	" " 121	6118
" " 96a	4813	" " 122	5709, 5717, 6058
" " 97a	4814	" " 122	5709, 5717, 6058
" " 98a	4795	" " 123-1	5713, 6126
		123-2	5714, 6138
" " 99a	4816	" " 124	5638
" " 100a	4807	" " 125	5736, 5869
" " 101a [1]	4819	" " 126	5823
" " 102a [1]	4859	" " 127	5724, 5807
" " 103a [1]	4843	" " 128	5731, 5842
" " 104a [1]	4817	" " 126	5823
" " 105a [1]	4830	" " 114a	5402
" " 106a [1]	4803	" " 114a	5402
" " 107a [1]	4825	" " 114a	5402
" " 108a [1]	4843	" " 129	5729, 5830
" " 109a [1]	4846	" " 129	5729, 5830
" " 110a [1]	4811	" " 130	5734, 5853
" " 111a [2]	4850	" " 131	6112
Deft's " 104	5170	" " 104a	5310
" " 105	5171	" " 105a	5383
" " 106	5172	" " 106a	5235
" " 107	5174, 5440	" " 107a	5441, 5461
" " 108	5180	" " 108a	5252
" " 109	5388	" " 109a	5385
" " 110	5483	" " 110a	5484
" " 111	5346	" " 111a	5345
" " 112	5376	" " 112a	5375
" " 113	5695	" " 113a-1	5698, 5880
		" " 113a-2	5699, 5900
		" " 113a-3	5704, 5925
		" " 113a-4	5702, 5960
		" " 113a-5	5706, 6021
		" " 113a-6	5707, 6051
" " 114	5425	" " 114a	5402
" " 115	5694	" " 115a	5354

[1] Government Exhibits 101a to 110a inclusive are recorded in the transcript as Government Exhibits 102a to 111a inclusive for the reason that these exhibit numbers were changed after they had been received in evidence.

[2] Government Exhibit 111a is recorded in the transcript as Government Exhibit 101a.

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